FILE COPY.

Supreme Court of the United States.

Office Supreme Court U. S.
FILED
SEP 29 1903
JAMES H. McKENNEY,
Clerk.

JOHN A. HUMBIRD and
FREDERICK WEYERHAUSER
vs.
WALDO A. AVERY, et al.

No. [illegible] 7.

Brief in Behalf of Defendants, Waldo A. Avery and others.

BENTON HASCKETT,
Of Counsel for Defendants Waldo A. Avery and others.

[illegible] HOYT,
Solicitor for Defendants Waldo A. Avery and others.

[illegible]

Supreme Court of the United States.

JOHN A. HUMBIRD and
FREDERICK WEYERHAUSER
vs.
WALDO A. AVERY, et al.

No. 89.

Brief in Behalf of Defendants, Waldo A. Avery and Others.

This suit is brought to quiet the complainants' title to the lands which are described in Exhibit A of the bill of complaint.

The complainants claim title to the lands through selection lists filed by the Northern Pacific Railroad Company under the grant of lands made to that company by Act of Congress of July 2nd, 1864, (13 U. S. Statutes, p. 365,) and by resolution of Congress of May 31st, 1870, (16 U. S. Statutes, p. 378,) and through transfer of the rights of the Northern Pacific Railroad Company to the Northern Pacific Railway Company, and by two deeds of conveyance by the latter company to the complainants, dated January 19th, 1900.

The lands are situated, a part in the first indemnity limits and a part in the second indemnity limits of the grant.

The defendants claim title to the lands under entries and purchases made under the land laws of the United States.

No question is made of the regularity of the entries and purchases, or of their validity, other than the claim of the complainants that the defendants' titles were taken and are held subject to the complainants' superior title obtained through said selection lists filed by the said Northern Pacific Railroad Company.

(Bill of complaint, paragraph XII, R. p. 11.)

I.

THE PLEADINGS.

The bill avers that the whole of the line of the Northern Pacific Railroad was definitely located, and the road was constructed from the City of Ashland in the State of Wisconsin, to a point on Puget Sound, and that the land in question was situated in the State of Minnesota opposite to and co-terminus with and more than twenty miles, but less than forty miles distant from said line of definite location of that portion of the railroad, extending from Thompson Junction to Ashland.

It sets up the complainants' title to the land by the following statements, viz.:

"That between the 16th day of October, 1883, and the 10th day of November of said year, the said Northern Pacific Railroad Company, complying in all respects with the instructions of the Secretary of the Interior, and under the direction of the Secretary of the Interior, duly selected all the lands described in said Exhibit A, to this bill of complaint annexed, by filing

in the United States District Land Office, at Duluth, in the State of Minnesota, within which district said lands so selected were situate, its certain selection lists under and in accordance with the provisions of said Act of Congress, approved July 2nd, 1864, and said joint resolution of May 31st, 1870, and thereby selected all of said lands as indemnity, in lieu of other lands excepted from said grant."

"That the said selection lists were four in number, and were numbered respectively 10, 15A, 15B and 16, the first of the aforesaid lists relating to lands within the first indemnity limits, and bearing date October 17th, 1883, and the others relating to lands within the second indemnity limits, and bearing date October 17th, 1883, or some other date or dates to plaintiffs unknown."

"That upon the filing of said several selection lists, said Northern Pacific Railroad Company duly paid to the Land Officers of said District Land Office all the fees required by law, and said officers duly certified under dates of October 17th and November 9th, 1883, that said selection lists were accepted and approved, and that the lands described therein, including all the lands described in said Exhibit A hereto attached, were public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights."

"And plaintiffs further allege that thereafter, and on the 17th day of October, and on the 9th day of November, 1883, and on the 10th day of October, 1887, complying with certain other and further instructions of the Secretary of the Interior, the said Northern Pacific Railroad Company filed in the said District Land Office at Duluth, Minnesota, certain lists wherein and whereby said Railroad Company specified *an equal quantity of lands lost from the primary or place limits of said grant*, under the provisions of said Act of July 2nd, 1864.

and said resolution of May 31st, 1870, equal in area to those lands described in the said several selection lists hereinbefore mentioned."

"That thereafter, and on June 19th, 1891, and on April 11th, 1893, the said Northern Pacific Railroad Company, insisting and maintaining that its prior selections of the lands described in the said Exhibit A, hereto annexed, were in all respects valid and sufficient, and for the purpose of complying with certain other and further directions and requirements of the Secretary of the Interior, issued subsequent to the original dates of selection hereinbefore mentioned, and complying in all respects with said subsequent instructions of the Secretary of the Interior, filed in said United States District Land Office at Duluth, Minnesota, *certain re-arranged lists, wherein and whereby said railroad company designated the particular losses of lands within the primary or place limits of said grant,* in lieu of which it selected each tract of land described in the several indemnity selection lists hereinbefore mentioned, and particularly each tract of the lands in the aforesaid Exhibit A described."

"Plaintiffs further allege that each of the tracts described in said several indemnity selection lists, and each of the tracts described in said Exhibit A, was selected by said Railroad Company in lieu of a tract or tracts of corresponding size situate within the primary or place limits of the original grant to said Railroad Company, within the State of Minnesota, which had been lost to the said Railroad Company by reason of having been granted, sold, reserved, occupied, pre-empted or otherwise disposed of prior to the time when that part of the line of said road lying opposite the same had been finally fixed and located, each of which tracts so lost to said company was and is situate in the State of Minnesota, and coterminus with and within twenty miles of the line of said Northern Pacific Railroad, as definitely fixed in and through

the State of Minnesota; and that at the date of the definite location of that portion of the line of said Railroad Company in the State of Minnesota opposite thereto, the said lands so designated as particular losses in lieu of which the aforesaid indemnity selections were so made, had been granted, sold, reserved, occupied, pre-empted or otherwise disposed of by the United States, whereby the said Northern Pacific Railroad Company had become entitled to receive indemnity therefor."

"Plaintiffs further allege that neither at the time of the final location of that part of said line of railroad extending from Thompson Junction westward across the State of Minnesota, nor at the final location of that part of the line of said road extending eastward from said Thompson Junction to Ashland, was there, in the State of Minnesota, the amount of lands per mile (either of the said road lying in Minnesota to the eastward of said Thompson Junction, or of the said line as afterwards extended as aforesaid to the easterly boundary line of said State) granted by Congress to said company within the limits prescribed by its charter; and that it was to make good the deficiency so existing on account of said line of railway in the State of Minnesota, and conformably in all respects to the conditions and requirements of the joint resolution of Congress hereinbefore mentioned, that all the lands in Exhibit A, described, lying more than thirty miles distant from the line of said road as finally located, were selected by said railroad company, each of said tracts so selected representing a tract or tracts of like size lost as hereinbefore described, and which, by reason of the deficiency aforesaid, could not be made good within the indemnity limits originally fixed by said Act of 1864. That all of the lands in Exhibit A, described, are non-mineral lands."

"And plaintiffs further allege that in accordance with the practice of the Land Department of the United States, said

selection lists, filed as hereinbefore alleged, and said lists of losses hereinbefore mentioned, were duly transmitted to the Commissioner of the General Land Office, and that the same are now parts of the files in said office, *but that no action has ever been taken upon said lists or upon the selection of said lands mentioned in Exhibit A, aforesaid, except as hereinbefore and hereinafter set forth.*"

"And plaintiffs further allege that by virtue of the matters hereinbefore set forth, the said Northern Pacific Railroad Company became the owner and entitled to the possession of all the lands in the said Exhibit A, hereto annexed described; and that thereafter and during the year 1898, all the rights, interests and ownership in the lands described in said Exhibit A, which had been theretofore owned or enjoyed by the said Northern Pacific Railroad Company, were duly sold, conveyed and transferred to the Northern Pacific Railway Company, a corporation duly organized and doing business under the laws of the State of Wisconsin."

"That thereafter, and on or about the 19th day of January, A. D. 1900, the said Northern Pacific Railway Company, for value received, duly sold and conveyed by warranty deed in due form to plaintiffs, all of the lands described in the said Exhibit A, hereto attached."

"That down to the time of the execution and delivery of the said deed from the Northern Pacific Railway Company to plaintiffs, the Honorable Secretary of the Interior of the United States had not, nor has he at any time heretofore, caused to be prepared or delivered to either of the said railroad companies, or to any one, a list or lists of any of the tracts which had been purchased or settled upon, or occupied, opposite to, or along any portion of the line of road of said Northern Pacific R. R. Co. east of Thompson Junction aforesaid, as provided by the Act of Congress, entitled, 'An Act making appropriations for sundry civil expenses of the gov-

ernment for the fiscal year ending June 30th, 1899, and for other purposes,' approved July 1st, 1898."

"Plaintiffs further allege that at the respective dates of the definite location of the various portions of the whole of the said main and branch lines of said railroad, and within the primary limits of the grant to said railroad company, there were ten million six hundred and twenty-four thousand seven hundred and forty-six and 27-100ths (10,624,746.27) acres of land which were lost from said grant by reason of the exceptions contained in said Act of Congress of July 2nd, 1864; that at said respective dates of definite location, there were within the indemnity limits prescribed in said Act of Congress, approved July 2nd, 1864, not more than seven million one hundred and seventy-seven thousand seven hundred and sixty-nine and seventy-one one hundredths (7,177,768.71) acres of land subject to selection under the terms of said Act of Congress of July 2nd, 1864, as indemnity for lands excepted from said grant."

"That of said ten million six hundred and twenty-four thousand seven hundred and forty-six and twenty-seven one hundredths (10,624,746.27) acres of land so excepted from said grant, and for which said railroad company was entitled to receive lands in lieu thereof, not more than two million eight hundred and eighty-seven thousand and seventy-six and fifty-seven one hundredths (2,887,076.57) acres were lost to and excepted from said grant subsequent to the passage and approval of said Act of July 2nd, 1864, and said last mentioned two million eight hundred and eighty-seven thousand and seventy-six and fifty-seven one hundredths (2,887,076.57) acres of said total ten million six hundred and twenty-four thousand seven hundred and forty-six and twenty-seven one hundredths (10,624,746.27) acres so lost as aforesaid, was the only portion thereof which could or can be satisfied under the provisions of the said joint resolution of Congress

approved May 31st, 1870, and that the total area of lands in the indemnity limits of said grant to said company, subject to selection as indemnity at the respective dates of the definite location of the various portions of the line of said railroad, lacked more than five hundred and fifty thousand acres of being sufficient to satisfy the losses of said grant."

"That by virtue of the premises and upon the definite location of the line of said railroad, the said Northern Pacific Railroad Company became the owner in fee of all of the lands described in said Exhibit A, hereto annexed."

The foregoing constitute all the statements of the bill showing the steps taken and measures adopted by which the complainants acquired title to the lands.

The bill states the title of the defendants to be, in brief, this:

That after the definite location of the railroad and the construction thereof, and at divers times subsequent to August 1st, 1893, all the lands described in Exhibit A, were permitted by the local land officers of the United States to be entered under various land laws providing for the entry and purchase of public lands; that the persons named in Exhibit A, as grantees, are persons to whom the lands of which they are described as grantees have been conveyed by deed in due form, from the entryman of said lands, the deeds being now of record in the office of the Register of Deeds of the county in which the lands are situated.

The bill further says: "That but for the vested rights of the said Northern Pacific Railroad Company and its grantees in the several tracts of land described in Exhibit A, the said lands would, at the several dates of the respective alleged entries thereof described in said Exhibit A, have been unappro-

priated public lands of the United States, open to the several kinds of entries or locations made or pretended to be made or applied for with respect to them severally as shown in Exhibit A, and that the several applications and proceedings, with respect to the said several entries were in due form and regularly conducted as required by law, and in the absence of vested rights of the said Northern Pacific Railroad Company, and its grantees, in the said premises, would have been operative and effectual to invest the several entrymen of said lands with vested rights and equitable interests therein; and that with respect to all of said entries which in the said Exhibit A are described as cash entries of lands, each of said entries have been finally receipted for, allowed and approved by the proper land officers of the United States."

Bill of complaint, paragraph XII, R. p. 11.

The answer of the defendants is joint and several. It admits the incorporation of the Northern Pacific Railroad Company, the grant made to it by Act of July 2nd, 1864, and by the resolution of May 31st, 1870; that the company, on November 21st, 1871, filed in the office of the Commissioner of the General Land Office a map of definite location of the portion of its road from Thompson Junction to Fargo, and that on the 6th of July, 1882, it filed its map of definite location from Thompson Junction to a point near the City of Ashland, Wisconsin.

The answer denies that the railroad company at any time made a selection of the lands in Exhibit A of the bill, in compliance with the instructions of the Secretary of the Interior, or under his direction, or ever filed selections of the lands in accordance with the Act of July 2nd, 1864, or the resolution of May 31st, 1870, and denies that the selections made by the railroad company were at any time approved by the Secretary

of the Interior, or the Commissioner of the General Land Office.

The answer also denies that there was any deficiency within the place limits of the grant which would require lands to be selected within the indemnity limits.

The answer puts the complainants to proof of all the other statements of the bill, relating to the complainants' alleged right or title to the lands.

It avers that the alleged lists filed by the railroad company were cancelled by the Secretary of the Interior and the Commission of the Land Office, and that the lands were made subject to entry and purchase by the Secretary of the Interior, and that the lands in Exhibit A in which the defendants are interested were duly and legally entered prior to January 1st, 1898, and certificates in the usual form were issued by the Land Department for some of the lands, and for others patents were issued.

It avers that the defendants were *bona fide* purchasers from the original locaters for value of the lands, without notice of any right or claim of the railroad company therein.

It avers that the Northern Pacific Railroad Company, and its successor, the Northern Pacific Railway Company, accepted the terms of the Act of Congress of July 1st, 1898, and of the circular of the Land Office of February 14th, 1899, for the adjustment by the Land Department of conflicting claims to lands within the limits of the grant to the Northern Pacific Railroad Company.

It avers that they have acted under said Act of July 1st, 1898, and said circular, and that they have made numerous relinquishments of lands thereunder, taking other lands in place thereof.

The defendants claim the lands under the provisions of the said Act of July 1st, 1898.

II.

The Regulations of the Secretary of the Interior for the Selection of Indemnity Lands.

The following are regulations provided for the observance of the Northern Pacific Railroad Company:

1st. Prior to May 28th, 1883, the railroad company was required, in making selection of indemnity lands, to furnish a list of the lands lost in place for which, tract for tract, indemnity lands were selected.

This appears by the instructions of Secretary Teller to the Commissioner of the General Land Office, May 28th, 1883, (12 L. D., 196.) referred to below, and in the decision of acting Secretary Chandler in Southern Minnesota Railway Extension Company, (12 L. D., 518,) and the decision of Secretary Smith in La Bar vs. Northern Pacific Railroad Co., (17 L D., 408, 409.)

2nd. The instructions of Secretary Teller to the Commissioner of the General Land Office, of May 28th, 1883, relating to the Northern Pacific Railroad Company, as follows:

"May 28th, 1883.

The Commissioner of the General Land Office:

Sir:—It is my desire to open for settlement, as speedily as possible, all the lands within the indemnity limits of the grant to the Northern Pacific Company not actually required to supply the lands lost in place within the granted limits.

The grant should be adjusted at the earliest possible time, *that the orders of withdrawal may be vacated without unreasonable delay*, as indicated in my letter of the 17th instant.

The unparalleled demand for lands for actual settlement by great numbers of persons, not only from foreign countries, but from the older states, seeking homes, under the settlement laws, along the line and in the vicinity of the Northern Pacific grant, requires, for the best interest of the country, and for all parties concerned, *that the withdrawals should not be maintained any longer than is actually necessary* for the adjustment of the guaranteed rights of the company.

In order to facilitate the work of making selections, I think you should instruct the local officers that, when clear lists of selections, free from conflict or other objection, are filed with the district officers and approved by them, said selections should at once be marked upon their books *and forwarded for final examination, leaving the ascertainment of the lands lost in place to your office, instead of requiring preliminary lists of such lands, together with the indemnity lands, tract for tract, from the company as heretofore.*

I am satisfied that the work of adjusting the grant will go forward much more rapidly under this plan than under the former practice.

Very respectfully,

H. M. TELLER,

Secretary."

(11 L. D., p. 196.)

3rd. The instructions of Secretary Teller to the Commissioner of the General Land Office, of July 11th, 1883, in addition to the instructions of May 28th, 1883, relating to the Northern Pacific Railroad Company, as follows:

"I call your attention to my letters of May 17 and 28 last, relating to the Northern Pacific land grant, and particularly to the indemnity part of such grant. * * * Under the authority conferred and in discharge of the duty imposed upon

ase by the Act, which provides that the selections shall be made under the direction of the Secretary of the Interior, I deem it best to indicate at the outset what, in my opinion, the practice should be in relation to selections. The amount of lands lost within each of the states named should be made up by selections within such State, *without regard to quality*, if there be sufficient within the indemnity limits for that purpose. *I do not think it was the intention of the granting Act, nor do I deem it just or equitable to the government, or to the settlers, to permit the company to call the lands within such limits, leaving portions unselected because they are poor, and then selecting other lands further along the line, in place of lands lost within the granted limits of those states.*"

The Public Domain, p. [illegible].

4th. Regulations for the adjustment of the railroad land grant stated to be in effect December 1st, 1889, and embodying regulations in force June 30th, 1889.

The Public Domain, p. [illegible] et [illegible], and Exhibit [illegible], Record pp. [illegible], [illegible].

Division V of these regulations is as follows:

"In the adjustment of grants for railroads the principle has, until recently, prevailed, that indemnity was allowed for all lands sold, reserved or disposed of within the granted limits, whether such sale, reservation or disposal occurred before or after the granting Act, and the certifications and patents have been executed in conformity thereto."

"In accordance with the recent decision of the Supreme Court in the case of the Leavenworth, Lawrence and Galveston Railroad Company vs. United States, (2 Otto, 733,) it is held by the department that indemnity can only be allowed for lands sold, reserved or disposed of in the granted limits by the general government after the granting Act and prior to the

time when the railroad right attached, unless the grant be one of quantity specifically set forth in the Act. *In the adjustment of all grants it consequently becomes necessary to know for what lands lost in place the indemnity selections are made, and wih the view to that end you will require the companies to designate the specific tracts for which the lands selected are claimed."*

The Public Domain, p. 938.

5th. Railroad indemnity selections, circular of August 4th, 1885, as follows:

"Before admitting railroad indemnity selections in any case you will require preliminary lists to be filed specifying the particular deficiencies for which indemnity is claimed. You will then carefully examined your records, tract by tract, to ascertain whether the loss to the grant actually exists as alleged. You will admit no indemnity selection without a proper basis therefor. If you are in doubt whether the company is entitled to indemnity for losses claimed, you will transmit the preliminary lists to this office for instructions, and will not place the selections upon record until directed so to do."

"Where indemnity selections have heretofore been made without specification of losses, you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed."

"The selecting agent applying to make indemnity selections must state in his affidavit attached to the list presented that the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner."

"Where deficiencies exist, for which indemnity is allowed by law, the lieu selections must be made from vacant unappropriated land within proper selections and limits *nearest the grant-*

ed sections in which the loss occurred. You will be careful to see that this rule is strictly complied with, *and will reject all selections not made in conformity thereto.*

Approved:

L. Q. C. LAMAR,
Secretary."

(4 L. D., p. 90.)
Exhibit N, Rec. pp. 763, 764.

6th. The directions of Secretary Smith to the Commissioner of the General Land Office of October 14th, 1893, as follows:

"It would seem that there is necessity for some positive action in the premises. Aside from the legal aspect of the case and the protection of the rights of adverse claimants, it will greatly facilitate the work of the adjustment of these grants, to exact compliance with the regulations heretofore prescribed in the matter of the selection of indemnity lands."

"I have, therefore, to direct *that you call upon all railroad companies having pending indemnity selections to revise their lists within six months from the date of your order, so that a proper basis will be shown for each and all lands now claimed as indemnity,* the same to be arranged tract for tract in accordance with departmental requirements, and that all tracts formerly claimed for which a particular basis has not been assigned, in the manner prescribed, at the expiration of said six months, be disposed of under the terms of the orders restoring indemnity lands without regard to such previous claim."

"The requirements of the order of August 4, 1885, should also be enforced, and the companies should be required to specify a basis, not only for the selections now pending, but

for all selections heretofore approved on account of which no previous loss has been assigned."

"This is as necessary to the protection of the interests of the United States, and as an aid in the adjustment of the grants, as the requirement of a specification of losses for pending selections, for without such designation on account of approved selections, *it cannot be ascertained whether a particular loss now assigned has not already been fully satisfied by previous approvals."*

"To bind the companies they must make their own selections, which necessitates the statement of a basis on which such selections rest, and while they are to be made under the direction of the Secretary of the Interior, it is not contemplated that the work is thereby transferred and added to the duties of your office."

"The regulations in the matter of the selection of indemnity lands must, therefore, be strictly enforced, and if the losses assigned for previous approvals are carefully examined to the end that a good basis is shown to exist for each tract heretofore received as indemnity, and are not duplicated in the losses assigned for pending selections, the grants will practically adjust themselves."

La Bar vs. Northern Pacific R. R. Co., 17 L. D., 406 at 410.

III.

THE SELECTION LISTS.

The statements of the bill show that the selections of the lands upon which the complainants claim title were made on October 16th and November 10th, 1883, by lists numbered 10, and 15, which were not accompanied by any list or statement

of lands lost in the place limits as a basis of the selection lists, and that these lists were not only not approved by the Secretary of the Interior, but that, on the contrary, in compliance with certain other and further instructions of the Secretary of the Interior, the railroad company filed in the District Land Office at Duluth, October 17th and November 9th, 1883, and October 10th, 1887, certain lists by which the railroad company specified *an equal quantity of lands lost* from the primary limits, equal in area to those lands described in the several selection lists.

The bill further shows that approval of the selections was not made upon filing these subsequent lists; on the contrary, it is stated that for the purpose of complying with "certain other and *further* directions and requirements of the Secretary of the Interior, *issued* subsequent to the dates of the original selection, the railroad company filed, in the District Land Office at Duluth, on June 9th, 1891, and *April* 11, 1893, certain re-arranged lists whereby the railroad company designated *the particular losses of lands within the primary limits*, in lieu of which it selected each tract of land described in the several indemnity selection lists hereinafter mentioned, and particularly each tract of lands described in said Exhibit A."

The statements of the bill further show that the selections *were not approved after the filing of these last re-arranged lists;* on the contrary, the bill states that the said selection lists, filed as hereinbefore alleged, and said lists of losses hereinbefore mentioned, were duly transmitted to the Commissioner of the General Land Office, and the same are now parts of the files of said office, *but that no action has ever been taken upon said lists, or upon the selection of said lands mentioned in said Exhibit A, except as hereinbefore and hereinafter set forth.*

There is nothing afterwards set forth in the bill of complaint upon the subject.

There is no statement that the lands selected either in the first indemnity limits or in the second indemnity limits *were nearest to the lands lost for which the selections were made.*

The only statement is that each of the tracts in the selection lists, and each of the tracts described in Exhibit A, was selected in lieu of a tract of corresponding size lost to the railroad company within the primary limits situated in the State of Minnesota.

The lists put in evidence by the complainants are the following Exhibits:

Exhibit 19, List No. 10, filed Oct. 18, 1883, p. 325.
Exhibit 20, List No. 10, filed Oct. 10, 1887, p. 332.
Exhibit 21, List No. 10, filed July 19, 1891, p. 346.
Exhibit 22, List No. 15, filed Oct. 18, 1883, p. 368.
Exhibit 23, List No. 15B, filed April 11, 1893, p. 379.
Exhibit 24, List No. 16, filed Oct. 18, 1883, p. 406.
Exhibit 25, List No. 16, filed April 11, 1893, p. 411.

The following facts in relation to these lists appear by the lists themselves, viz.:

1st. The requirement of the Secretary that "the selecting agent applying to make indemnity selections must state in his affidavit attached to the list presented that the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner," was not complied with.

2nd. The selections of the indemnity lands were not made of lands nearest to the lands lost on account of which the selections are made.

3rd. The selections were not approved by the Secretary of the Interior.

IV.

The Circumstances Under Which the Controversy in Relation to the Lands Has Arisen.

On November 20th, 1871, the Northern Pacific Railroad Company filed a map of definite location of its road from Thompson Junction to Fargo.

It also, previous to that time (July 9, 1870,) had made an agreement with the Lake Superior and Mississippi Railroad Company, which had built a road from Thompson Junction to Duluth, to run its trains over that road to Duluth, making Duluth one of its principal points of trade and trans-shipment on Lake Superior.

On January 1st, 1872, a further agreement was made by which the Northern Pacific Railroad Co. purchased a one-half interest in the road, and the right to use it jointly with the Lake Superior & Mississippi Railroad Co.

Under these agreements the Northern Pacific Railroad Co. runs its trains to Duluth.

On the 6th of July, 1882, the company filed its map of definite location from Thompson Junction, by way of Superior City, to a point on Lake Superior east to Ashland.

In 1884, the board of directors fixed the eastern terminus of the road at Ashland, Thereafter the Commissioner of the General Land Office prepared a diagram, showing the terminus of the road at Ashland, and sent it to the district offices, with instructions to adjust the land grant on that basis.

The road from Thompson Junction to Superior City was constructed during the years 1881 to 1884.

It was constructed to Ashland, so that its construction was approved to that point in 1885.

After the instructions of October 14th, 1893, by the Secretary of the Interior to the Commissioner of the General Land Office were issued in the case of La Bar vs. Northern Pacific Railroad Company, (17 L. D., 410.) above quoted, requiring the railroad company to revise its lists within six months, tract for tract, showing the basis on which selections were made, and to comply with the circular of August 4, 1885, (4 L. D., 90,) and to which requirement no response was made by the railroad company, and on November 13, 1895, a selection of lands in North Dakota, based upon losses of lands in the primary limits in the Ashland district of Wisconsin, was presented for approval to the Secretary of the Interior.

He refused approval, holding that if the agreement made between the Northern Pacific Railroad Co. and the Lake Superior & Mississippi Railroad Co. constituted a consolidation of the roads from Thompson Junction to Duluth, then Duluth was the eastern terminus of the Northern Pacific Railroad.

But if the agreement did not constitute such a consolidation, then Superior City would be the eastern terminus of the road, and, in either case, the Northern Pacific Railroad Co. was not entitled to any lands east of Superior City.

August 27th, 1896, the Secretary of the Interior decided, upon the evidence presented before him, that there was a con-

solidation of the two roads from Thompson Junction to Duluth, and that Duluth was the eastern terminus of the Northern Pacific Railroad.

July 27, 1897, the Secretary of the Interior approved the action of the Commissioner of the General Land Office, in giving public notice that all lands lying east of the terminal at Duluth, which had heretofore been withdrawn on account of the grant to the railroad company, be restored to the public domain and subject to disposal.

Exhibit 30, Rec. pp. 429 to 431.

Under this action of the Secretary of the Interior, a large part of the lands in controversy were entered and purchased at the Land Office by the parties under whom the defendants claim the lands.

April 16th, 1900, the Supreme Court of the United States decided that the eastern terminus of the road was at the City of Ashland, Wisconsin.

Northern Pacific R. R. Co., 21 L. D., 412.
Northern Pacific R. R. Co., 23 L. D., 204.
Northern Pacific R. R. Co., 25, L. D., 47, 48.
Doherty vs. Northern Pacific R. W. Co., 177 U. S., 421.
United States vs. Northern Pacific R. Co., 177 U. S., 435

After the decision of the Supreme Court, and on July 12, 1900, the Secretary restored the selections made by the railroad company of these lands to the records of the Land Department for consideration of their approval, *and they now await his action to approve or disapprove them, according as he shall find the rights of the railroad company to be in relation to them.*

Complainants' Exhibits 31 and 32, R. pp. 431, 432.

Exhibit 45, R. pp. 491, 492.

In the mean time the Act of Congress of July 1st, 1898, was adopted, (30 U. S. Stat., 620, 621, 622,) providing for an adjustment of the respective claims of the railroad company, and the parties who, like the defendants, have acquired from the United States claims to the lands.

By this Act the election was given to such parties to retain the lands, and in case of their election to retain the lands, the railroad company is to release its claim thereto and take other lands in lieu thereof.

The railroad company accepted the terms of the Act on July 13th, 1898, and has ever since been acting under it, and the Land Department has been engaged in administering the Act.

The defendants claim the benefit and protection of said Act.

V.

The Act of July 1, 1898.
30 U. S. Stat., 620, 621, 622.

By the terms of the Act of July 1st, 1898, and the acceptance of the Act by the Northern Pacific Railway Company, the complainants are not entitled to the lands in question which were purchased, settled upon, or claimed in good faith by the defendants or their assignors prior to January 1st, 1898.
30 U. S. Stat., 620, 621, 622.

This Act provides, "That where, prior to January 1, 1898, the whole or any part of an odd numbered section in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee, or its lawful successor, is claimed to have attached by

definite location or selection, has been purchased directly from the United States or settled upon or claimed in good faith by any quaified settler under color of title or claim of right under any law of the United States, or any ruling of the Interior Department, and where purchaser, settler or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee, or its successors in interest, upon a proper relinquishment thereof, shall be entitled to select, in lieu of the land relinquished, an equal quantity of public lands, surveyed or unsurveyed * * * situated within any State or territory into which said railroad grant extends, and patents shall issue for the lands so selected as though they had been originally granted."

The Act further provides, "That the Secretary of the Interior shall, from time to time, ascertain, and, as soon as conveniently may be done, cause to be prepared and delivered to the said railroad grantee, or its successor in interest, a list or lists of the several tracts which have been purchased or settled upon, or occupied as aforesaid, and are now claimed by said purchasers or occupants, their heirs or assigns, according to the smallest government subdivision. And all right, title and interest of said railroad grantee, or its successor in interest, in and to any of such tracts, which the said railroad grantee, or its successor in interest, may relinquish hereunder, shall revert to the United States, and such tracts shall be treated, under the laws thereof, in the same manner as if no rights thereto had ever vested in the said railroad grantee, and all qualified persons who have occupied and may be on said lands as herein provided, or who have purchased said lands in good faith as aforesaid, their heirs and assigns, shall be permitted to prove their titles to said lands according to law, as if said grant had never been made; and upon such relinquishment said Northern Pacific Railroad Company, or its lawful successor in in-

terest, may proceed to select, in the manner hereinbefore provided, lands in lieu of those relinquished, and patents shall issue: Provided, further, That the railroad grantee, or its successor in interest, shall accept the said list or lists so made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it, but it shall not be bound to relinquish lands sold or contracted by it, or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron or coal."

The Act further provides that all qualified settlers, their heirs or assigns, who, prior to January 1st, 1898, purchased or settled upon or claimed in good faith any part of an odd numbered section in either the granted or indemnity limits of the land grant, "may, in lieu thereof, transfer their claims to an equal quantity of public lands surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron or coal, and free from valid adverse claim, or not occupied by a settler at the time of such entry, situated in any State or territory into which such railroad grant extends, and make proof therefor as in other cases provided; * * * and before the Secretary of the Interior shall cause to be prepared and delivered to said railroad grantee, or its successor in interest, any list or lists of the several tracts which have been purchased or settled upon or occupied as hereinbefore provided, he shall notify the purchaser, settler or claimant, his heirs or assigns, claiming against said railroad company, of his right to transfer his entry or claim, as herein provided, and shall give him or them option to take the lieu lands for those claimed by him or them, or hold his claim and allow the said railroad company to do so under the terms of this Act."

On July 13th, 1898, the Northern Pacific Railway Company accepted the provisions of said Act, by formal resolution filed in the Department of the Interior.

(Exhibit L., R. p. 758.)

On February 14th, 1899, the Secretary of the Interior issued regulations for the carrying out of the provisions of the Act, in pursuance of its terms.

(Duluth Ex. K., R. p. 737.)
28 L. D., 103 to 118.
28 L. D., 470, 471.

The conveyance from the Northern Pacific Railway Company to the complainants of the lands in question was made January 26th, 1900.

(Ex. No. 50, R. p. 499.)
(Ex. No. 51, R. p. 503.)

1st. By the acceptance of the Act, and upon its acceptance by the Northern Pacific Railway Company the rights of the railway company were limited to selecting other lands in lieu of the lands described in Exhibit A of the bill, which were purchased, settled upon or claimed in good faith under color of title, or claim of right, under any law of the United States, or any rulings of the Interior Department, prior to January 1st, 1898, which the purchasers, settlers or claimants should elect to hold

It is not a question here whether the Northern Pacific Railway Company may have refused to accept the provisions of the Act, or might have claimed the right to stand upon the grant of July 2nd, 1864, and May 31st, 1870, and what in such case its rights would have been.

The railway company waived and yielded up the right so to do, and assented to and accepted the terms of the Act of July 1st, 1898, and the rights granted by that Act, in the place and stead of its right to insist upon the terms of said Act of July 2nd, 1864, and May 31st, 1870, and claim the lands which were claimed by the purchasers, settlers and claimants described in said Acts.

The United States made to the Railway Company, by the Act of July 1st, 1898, the offer of the right to select other lands situated in any state or territory into which its railroad grant extends without any limit within which its selection should be made, other than the limits of such states and territories, in lieu of the lands claimed by the purchasers, settlers and claimants, and without reference to the validity of the claims of the latter.

The acceptance of this offer by the railway company constituted a valid contract between the United States and the railway company, and left the United States free to deal with such purchasers, settlers and claimants.

The question here is, what are the rights of the railway company under the terms of the Act of July 1st, 1898?

The provisions of the Act, stated in the order in which they are to be carried out, require:

First. That the Secretary of the Interior "shall notify the purchaser, settler or claimant, his heirs or assigns, claiming against said railroad company, of his right to transfer his entry or claim, as herein provided, and shall give him or them option to take free lands for those claimed by him or them, or hold his claim and allow the said railroad company to do so under the terms of this act."

Here is distinctly granted to the purchaser, settler or claimant, his heirs or assigns, the absolute option to either take free

lands for the lands claimed by them, or to hold their claims and allow the railroad company to take lieu lands for such lands.

Second. The Act requires that after the Secretary shall have given such option to the purchaser, settler or claimant, his heirs or assigns, the Secretary "shall, from time to time, ascertain, and, as soon as conveniently may be done, cause to be prepared and delivered to the said railroad grantee, or its successor in interest, a list or [illegible] of the several tracts which have been purchased or settled upon or occupied as aforesaid, and are now claimed by said purchasers or occupants, their heirs or assigns, according to the earliest government subdivisions."

Third. The Act requires, "That the railroad grantee, or its successor in interest, shall accept the said list or lists so to be made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it, and it shall not be bound to relinquish lands other or contrary to it, or lands which it may or could for railroad purposes, or lands valuable for mine, iron or coal."

Fourth. The Act says: "And upon said relinquishment said Northern Pacific Railroad Company, or its lawful successor in interest, may proceed to select, in the manner herein before provided, lands in lieu of those relinquished, and no one shall lose therefor."

Fifth. The Act says: "The railroad grantee, or its successor in interest, upon a proper relinquishment hereof, shall be entitled to select, in lieu of the land relinquished, an equal quantity of public land, surveyed or unsurveyed, not mineral or reserved, and not valuable for mine, iron or coal, and free

from valid adverse claim, or not occupied by settlers at the time of such selection, situated within any State or territory into which such railroad grant extends, and patents shall issue for the lands so selected as though it had been originally granted."

Briefly, the Act gives the absolute option to the purchasers, settlers or claimants, their heirs or assigns, to hold their claims to the lands. The Secretary of the Interior is to furnish the railway company a list of the lands which are thus claimed. That list is to be conclusive of the lands which the railway company is required to relinquish, except as to lands sold or contracted by it, or which it needs for railroad purposes, or is valuable for stone, iron or coal, and in the place of such lands it is to select other lands.

Having accepted the Act, the railway company has no option or election as to lands which it is to relinquish. *The only option given by the Act in respect to these lands is the option expressly given to the purchaser, settler or claimant.*

There is no provision in the Act for any election to be made by the railroad company as to whether it will or will not relinquish any land.

If any of the purchasers, settlers or claimants elect to retain the lands, the railroad company is required to relinquish them. It can in no manner control or interfere with the election of the purchaser to hold the lands. *The railroad company exercised its option when it elected to accept the provisions of the Act of July* 1st, 1898.

2nd. The right of the defendants to the lands in question is not defeated by the conveyance of the lands by the railway company to the complainants.

The conveyance was made to the complainants after the company had accepted the Act, and after the Secretary of the Interior had issued his regulations for carrying out its provisions.

(Exhibits 50 and 51, R. pp. 499 and 503.)
(Exhibit K., R. p. 737.)
28 L. D., 103.

The provision of the Act that the railway company *"shall not be bound to relinquish lands sold or contracted by it,"* refers to lands sold or contracted to be sold at the date of the passage of the Act.

By its acceptance of the Act, the railway company *gave its express assent that the purchasers, settlers and claimants should have the right to elect to hold all the lands which had not then been sold or contracted to be sold.*

The complainants' construction of the Act and its acceptance is this:

That the railway company assented that the purchasers, settlers and claimants should have the right to elect to hold such of the lands as the railway company should not elect to sell or contract to sell, and that the railway company assented to accept the right to select throughout the various states and territories into which its grant extended, lands in place of those lands which it should not choose to sell, and which the purchasers, settlers and claimants might elect to hold.

The complainants' construction of the Act gives it the opportunity to prevent the purchasers, settlers and claimants from having any opportunity or option to retain or hold any of the lands. It leaves to the purchasers, settlers and claimants only the right to elect to take such of the lands as the railway company should not wish to retain.

In other words, the complainants' construction would confer upon the railway company the right to exclude the purchasers, settlers and claimants from any option or opportunity to hold any of the lands which the railway company did not wish them to hold, and leaves them only the option to take such lands as the railway company wanted to get rid of taking under the grant and to have exchanged for lands to be selected by it throughout the wide domain of all the states and territories into which its grant extended.

If this construction be adopted, the purchaser, settler and claimant are deprived of the option to retain or relinquish the lands, which option is expressly given to them by the terms of the Act.

We submit the complainants' contention is a manifest violation of the terms and intent of the Act, and enables it to defeat the operation of the Act. The Act was intended for the relief of the purchasers by giving them an opportunity to retain the lands which had not been sold or contracted to be sold at the time the Act was passed, giving the railway company an opportunity to select from a wide domain other lands in place of them.

Under the complainants' construction the railway company would have no interest in the prompt carrying out of the provisions of the Act. The longer the delay of the Secretary of the Interior in carrying out the provisions of the Act and in giving the opportunity or option to the purchasers, the greater would be the opportunity to the railway company to make sale and contracts of sale of the lands which it desired to take from the settler.

It will be observed that by the regulations no act is required of the purchasers who wish to retain the lands, other than to retain them. There is nothing for them to do but to hold their claims.

Regulations 15, 17, 18, 20, 21, R. pp. 745, 746.
28 L. D., pp. 109, 110.

Regulation 20 is as follows:

"In all cases where the individual claim has passed to final entry and certificate, or to the submission of final proof entitling the claimant to final entry and certificate, proof of the continued maintenance of the claim is not essential, but a failure to exercise such option within the time named will be deemed an election on the part of the individual claimant to hold the land in contest."

The failure of the Secretary of the Interior to furnish to the Northern Pacific Railway Company a list of these lands in pursuance of the Act, furnished no ground to the company to make conveyance of the lands. It is not shown that the Secretary did not act with as much promptness as the business of his department would permit. There is no showing that the railway company has ever sought to have such list furnished, or has in any manner endeavored to hasten the action of the Secretary, as certainly it might have done had there been any ground to urge more speed. But the delay in furnishing such list, if there was any delay, in no way changed or affected the rights of the purchasers, settlers and claimants under the Act.

Oregon & Cal. R. Co. vs. United States, 189 U. S., 116.

In the above case the grant made in 1870 to the railroad company required that "the Commissioner of the General Land Office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed." The final survey was not approved until 1893. In 1891 a homesteader settled upon some of the indemnity lands. The controversy was as to his right. In deciding the case the Court say (p. 118): "The railroad company rests its claim to have a superior right to these lands on the ground, in part, of long delay by the Commissioner of the Land Office in having them surveyed,

although it frequently requested the survey to be made. There is nothing of substance in this contention. The statute, it is true, required the lands to be surveyed with all 'convenient speed.' But the question as to the precise time the lands should be surveyed was exclusively for the Land Office to determine; and it was to be determined with reference to all the facts and circumstances connected with the surveying of the public lands under the direction of the Land Department. We can not say from the record that the Land Office, in the matter of surveying the particular lands here in dispute, did not act with convenient speed. Besides, the railroad company accepted the grant of Congress subject to the possibility of delay in the surveying, as well as the power of the Land Office to determine when the lands should be surveyed."

It is equally clear than when the Northern Pacific Railway Company accepted the provisions of the Act of July 1, 1898, the acceptance was subject to the possibility of such delay as might occur in furnishing to it, by the Secretary, the lists of lands which the claimants would elect to hold, and which the railway company would be required to release.

3rd. The complainants' contention that if their construction of the Act is not accepted it will be impossible for the Northern Pacific Railway Company to convey a marketable title to any of its lands until the whole grant is adjusted under said Act.

The precise question in this case is whether by the conveyance made by the Northern Pacific Railway Company to the complainants on January 26, 1900, after the Secretary of the Interior had issued his regulations for carrying out the provision of the Act and was engaged in making the adjustment

under the Act, these defendants are deprived of the benefits of its provisions.

To what extent lands have been purchased, settled upon, or are claimed, in addition to the claims of these defendants, does not appear by any evidence in the case. The statement of the complainants upon that subject is entirely an assumption, with no evidence for its support.

When the Act of July 1, 1898, was passed the public records of the Land Department showed that the selections of these lands by the railroad company, under which the complainants claim them, had not been approved by the Secretary of the Interior, and showed that the lands, after such selections had been made, had been expressly opened by the Secretary of the Interior to entry, and that prior to January 1st, 1898, the entries of these lands had been made by the parties under whom these defendants have their title. There is no evidence in the record *that any other lands have been purchased, settled upon or are claimed under such conditions.*

These defendants upon those facts have a strong equitable claim upon the government for their protection. It is beyond question that the Act was intended for their protection.

When, immediately after the passage of the Act, it was accepted by the Northern Pacific Railway Company, that company had knowledge of these facts, and with that knowledge made its acceptance of the Act. Did it, when it accepted the Act, intend that the defendants should not have the benefit of its provisions?

It can not plead ignorance of the fact that these particular lands were opened to the public for entry by the Secretary of

the Interior, nor that they had been entered by the defendants' grantors, for these facts were matters of record.

This case is to be determined by its own circumstances and conditions, and its decision will control only such cases as present like facts.

The assumption that the railway company will be deprived of the opportunity to sell *any* lands is groundless. It will be deprived of the opportunity to sell lands purchased, settled upon or claimed under the same conditions and circumstances under which these lands are claimed, and it ought to be so deprived. Whether there are any other such cases is a fact easily to be determined by the railway company by an examination of the public records.

In all cases under the Act the Secretary of the Interior is to make a list of the lands, and he is to notify the purchaser, settler or claimant, and give him or them an option to take lieu lands or hold his claim.

The railroad company has the same means of knowledge which the Secretary of the Interior has as to what lands are claimed, and it does not need to wait for the adjustment in respect to these lands in order to make sale of other lands which fall under the grant.

4th. As the railway company had no right to convey the lands to complainants and defeat the operation of the Act as to the defendants, the complainants get no greater rights to the lands than the Northern Pacific Railway Company itself had.

The defendants' rights remain unaffected by such conveyance.

5th. The bill of complaint admits that the defendants acquired their rights to the lands in such manner as would entitle them to the benefit of the provisions of the Act of July 1st, 1898.

The bill says, paragraph XII, pages 11 and 12 of the record, as follows:

"Your orators further allege that but for the vested rights of the said Northern Pacific Railroad Company and its grantees in the several tracts of land described in Exhibit A, the said lands would, at the several dates of the respective alleged entries thereof, described in said Exhibit A, have been unappropriated public lands of the United States, open to the several kinds of entries or location, made or pretended to be made with respect to them, severally, as shown in Exhibit A, and that the several applications and proceedings with respect to the said several entries were (in) due form and regularly conducted, as required by law, and in the absence of the vested rights of the said Northern Pacific Railroad Company and its grantees in the said premises, would have been operative and effectual to invest the several entryman of said lands *with complete equitable title thereto*, each of such entries and locations having been finally receipted for, allowed and approved by the proper land officers of the United States."

6th. The complainants' contention that the acceptance of the Act of July 1st, 1898, by the Northern Pacific Railway Company did not include the lands in Minnesota and therefore did not cover the lands in controversy.

The Northern Pacific Railway Company accepted the Act of July 1st, 1898, on July 13th, 1898, *in its entirety*.

(See defendants' Exhibit L., R. p. 758.)

It could not accept the Act in any other way. It could not accept it in part and not in the whole.

If at the time of this acceptance it was intending to acquire title to the grant, but had not yet obtained title, it would clearly, after acquiring the title, have been bound by the Act.

Again, had it at the time of the acceptance acquired title to a part of the lands but not to all of them, it would be as clearly bound by its acceptance, both as to the lands then acquired and also to those subsequently obtained. It would not have been necessary to repeat its acceptance of July 13th, 1898, as to subsequently acquired lands.

The acceptance was certainly made with the intent and purpose on the part of the Northern Pacific Railway Company to be bound by the Act in reference to the lands as the Northern Pacific Railroad Company would be bound by its own acceptance of the Act had it accepted it instead.

In respect to the relations of the Northern Pacific Railway Company to the grant at the time of its acceptance of the Act, the bill of complaint says (paragraph IX. R. p. 8) that, "*during the year* 1898 all the rights, interests and ownership in the lands described in said Exhibit A. which had been heretofore owned or enjoyed by the said Northern Pacific Railroad Company, were duly sold, conveyed and transferred to the Northern Pacific Railway Company."

The Act of July 1st, 1898, by its express terms, includes and applies to the successor of the Northern Pacific Railroad Company, whoever such successor might then be, or thereafter might become. The Act had in view the Northern Pacific Railway Company as such successor, which company was then existing, and had been formed for the purpose of becoming such successor. By a proviso the Act says "the legal question

whether the *Northern Pacific Railway Company* is such successor of the Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this Act."

It thus appears by the Act that at its passage the Northern Pacific Railway Company was in contemplation as the successor in interest, leaving the question upon the evidence showing its successorship to be determined by the Land Department.

February 6th, 1897, prior to the passage of the Act, the Secretary of the Interior had referred the question to the Attorney General in respect to issuing patents to the Northern Pacific Railroad Company's land grant to the Northern Pacific Railway Company, and under that date the Attorney General replied that, "In 1896 the mortgages so issued were foreclosed and all the property, rights and franchises of the company were sold at judicial sale to the Northern Pacific Railway Company, a Wisconsin corporation, which purchaser has entered into possession and claims ownership of the railroad and telegraph lines, lands and property of the Northern Pacific Railroad Company." The Attorney General further states to the Secretary of the Interior as follows: "You should act upon applications for patents by the new company upon exactly the same considerations which would govern you in case there had been no foreclosure and the applications were made by the old company."

(21 Official Opinions of Attorneys General, pp. 488, 491, Vol. 69, House Documents.)

The regulations of the Secretary of the Interior for carrying out the Act, issued February 14th, 1899, declared the

Northern Pacific Railway Company to be the successor in interest as to the lands within limits of the Northern Pacific Railroad Company's grant, excepting lands situated in Minnesota and North Dakota east of the Missouri River.

28 L. D., 105.

R. p. 741.

The Secretary of the Interior, *on August* 8th, 1899, approved a list of lands in Minnesota *for relinquishment under the Act of July* 1st, 1898. These lands are a part of the lands included in the conveyance by the Northern Pacific Railroad Company to the Northern Pacific Railway Company, by complainants' Exhibit 43 (R. p. 478), under which the complainants claim that title to the lands was conveyed to the Northern Pacific Railway Company. *The Northern Pacific Railway Company sought to make relinquishment under the Act of* 1898, *of the lands in this list*. Acting upon this election of the Northern Pacific Railway Company, the Secretary of the Interior decided that the Northern Pacific Railway Company was the lawful successor in interest "as to all the lands within the limits of the grant provided for in the Acts making grants to the Northern Pacific Railroad Company," and permitted relinquishment to be made by the Northern Pacific Railway Company.

Northern Pacific Railway Co., 29 L. D., 316, 317, 318.

The record in this case, by Exhibit H, pp. 665, 666, 667, also shows that the Northern Pacific Railway Company released lands in Minnesota under said Act of July 1, 1898, as the successor of the Northern Pacific Railroad Company, *which release was accepted November* 21, 1899, prior to the conveyance to the complainants, by the Secretary of the Interior, and

for such release the Northern Pacific Railway made a selection of other lands by said Exhibit H.

This action of the Northern Pacific Railway Company shows that the company was acting under the provisions of the Act in reference to the lands covered by the grant in Minnesota, and under its acceptance of the Act of July 1st, 1898, *prior to the conveyance of the lands in question by the Northern Pacific Railway Company to the complainants, which conveyance was on January* 19, 1900.

(Exhibits No. 50 and 51, R. pp. 499 and 503.)

The action of the Northern Pacific Railway Company shows that having accepted the provisions of the Act and acted under those provisions, it has undertaken to decide for itself what lands it will relinquish under the Act, and what lands it will not relinquish, *by conveying to other parties such of the lands as it desires to prevent the purchasers and settlers from exercising their option to hold.*

7th. The persons who are entitled to the benefits of the Act.

There are three classes of these persons, viz.: Those who had purchased the lands directly from the United States, those who had settled upon the land in good faith under color of title or claim of right under any law of the United States, or any ruling of the Interior Department, and those who claimed the lands in good faith under color of title or claim of right under any law of the United States or any ruling of the Interior Department.

The provisions of the Act are not confined to actual settlers, as contended by the complainants.

The first provision, describing the parties affected by the Act is: "That where, prior to January 1st, 1898, the whole or any part of an odd numbered section, in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, * * * * *has been purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department, and where purchaser, settler or claimant* refuses to transfer his entry as hereinafter provided," the railroad company may relinquish the land and select other lands.

The second provision of the Act for making the list of lands to be relinquished by the railroad company is, "That the Secretary of the Interior shall from time to time ascertain and, as soon as conveniently may be done, cause to be prepared and delivered to the said railroad grantee, or its successor in interest, a list or lists of the several tracts which have been *purchased or settled upon or occupied as aforesaid,* and are now claimed by said purchasers or occupants, their heirs or assigns, according to the smallest government subdivisions."

The third provision relating to the persons who may prove their title to the lands relinquished by the railroad company is that, "all qualified persons who have occupied and may be on said lands as herein provided, *or who have purchased said lands in good faith as aforesaid,* their heirs and assigns, shall be permitted to prove their titles to said lands according to law, as if said grant had never been made." The provision for giving the option to claimants is as follows: "Before the Secretary of the Interior shall cause to be prepared and delivered to said railroad grantee, or its successor in interest, any list or lists of the several tracts *which have been purchased or*

settled upon or occupied as hereinbefore provided, he shall notify the *purchaser, settler or claimant,* his heirs or assigns, claiming against said railroad company, of his right to transfer his *entry or claim.*"

It would be difficult to make language more plainly include purchasers and claimants of the land as well as settlers upon the land. If only settlers were intended there would have been no occasion to make use of the term "purchaser" or claimant.

There is one provision of the Act referring to settlers which does not include purchasers or claimants. It is a provision relating to unsurveyed lands and settlements made upon them subsequent to the date of the Act. It is as follows:

"That whenever *any qualified* settler shall in good faith make settlement in pursuance of existing law upon any odd numbered sections of unsurveyed public lands within the said railroad grant to which the right of such railroad grantee, or its successor in interest, has attached, then upon proof thereof satisfactory to the Secretary of the Interior, and a due relinquishment of the prior railroad right, other lands may be selected in lieu thereof by said railroad grantee, or its successor in interest."

From this provision "purchasers" and "claimants" are left out, because it was intended to limit the provision to settlers upon the lands.

It is equally clear that the term "purchaser" and "claimant" are used in the other provisions of the Act because it is not intended to limit those provisions to settlers upon the lands.

8th. The date at which the rights to the benefits of the provisions of the Act of July 1, 1898, became fixed.

It is not in any case the date of the patent issued to the claimant. The issue of the patent is an immaterial factor.

If the beneficiary under the act is simply as purchaser his right to the benefits of the act are fixed at the date when his purchase is made. If he is a settler upon the land his right to the benefits of the act is fixed at the date when he settled upon the land in good faith under the permission given by the homestead law, or other statute If he is a claimant of the land, not in the character of a mere purchaser or settler, his right to the benefits of the act is fixed at the date when in good faith he made his claim to the land under color of title or claim of right under any law of the United States, or any ruling of the Interior Department.

A. That is the construction of the Act by the Secretary of the Interior in the regulations adopted by him for carrying out the provisions of the Act.

His statement is that a beneficiary under the Act is, "any qualified person who, prior to January 1. 1898, by settlement, entry or purchase, *initiated* in good faith a claim to lands, of the description given, under color of title or claim of right under any law of the United States, or any ruling of the Interior Department, and who is still maintaining such claim conformably to such law or ruling."

(Record p. 740.)

This is also clearly the meaning of the language of the Act which defines the acts which constitute a beneficiary. The language is, "where, prior to January 1, 1898, the whole, or any part of an odd numbered section * * * has been *purchased* directly from the United States, or *settled upon* or *claimed* in good faith by any qualified settler under color of title or claim of right under any law of the United States or

any ruling of the Interior Deprtment, and where *purchaser, settler* or *claimant* refuses to transfer his entry as hereafter provided."

B. When one makes an entry of land for its purchase and pays for the land *he becomes then a purchaser* of the land. The issue of a patent is not required to constitute him a purchaser. In fact, when a purchase of land is made, in whatever manner as authorized bv statute, the patent does not issue until much time, and sometimes for years, thereafter, meanwhile the land belongs to him who is entitled to the patent. He is the purchaser and owner of the land.

Witherspoon vs. Duncan, 4 Wall., 210, at 218.
Defferback vs. Hawke, 115 U. S., 392, at 405.
Cornelius vs. Kessel, 128 U. S., 456, at 460.
Orchard vs. Alexander, 157 U. S., 372, at 383.
Clark vs. Herington, 186 U. S., 206, at 211.

In Witherspoon vs. Duncan, 4 Wall., 210, at 218, Harrell's heirs, on May 22, 1830, entered land and a certificate of entry was transmitted to the General Land Office, but a patent was not issued until February 5, 1846. The question in the case was whether the land was subject to taxation *as private property before the issue of the patent.* The Court holding the land subject to taxation say (p. 218): "According to the well known mode of proceeding at the land offices (established for the mutual convenience of buyer and seller), if the party is entitled by law to enter the land, the receiver gives him a certificate of entry reciting the facts, by means of which, in due time, he receives a patent. The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as

soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title. As the patent emanates directly from the President, it necessarily happens that years elapse before, in the regular course of business in the General Land Office, it can issue."

This decision has been many times referred to and approved by the Court. It is entirely clear under the authorities that in administering the Act of July 1, 1898, the Secretary of the Interior, in determining whether "land has been purchased 'prior to January 1, 1898, *is to be governed by the date when the purchase was made.* The inquiry is to be as to when the purchase was made, and not when the patent was issued, nor *whether a patent has issued.* Under the known practice of the Land Department, (of which the Court takes notice,) the patent is itself evidence that the purchase was made at some time prior to the date of the patent. The date of the purchase and the date of the patent are never the same. The purchase is made at the local Land Office, and upon report from that office to the General Land Office the patent issues from that office.

C. The issue of the patent does not exclude from the provisions of the act an entry made prior to January 1, 1898 as contended by complainants.

The object of the Act is the relief of the purchasers, settlers and claimants from the position in which they are placed by having purchased from the United States, or by having settled upon or claimed in good faith under color of title or claim of right under any law of the United States, or any ruling of the Interior Department, within the grant or indemnity limits of the land grant of the Northern Pacific Railroad Company.

It is the fact of purchase and of settlement and claim in good faith, which constitutes the ground for relief, and not the fact whether the purchase or settlement is evidenced by patent.

The jurisdiction of the Land Department under the Act is only to determine whether the claimant is such purchaser or settler.

The jurisdiction is not to determine the validity of the title acquired. It is the purpose of the Act to render unnecessary the decisions upon the validity of the title. There is no provision in the Act for the determination to be made under the Act of the company's right to the lands. The simple fact that the land is upon an odd numbered section within the grant or indemnity limits of the grant, and that it has been purchased, settled upon or claimed, and the purchaser, settler or claimant elects to hold his claim, authorizes the railroad company to relinquish the land and select other lands to stand in its stead.

It is only after the relinquishment of the lands to the United States by the railway company has been made, that the Act provides for the claimants making proof of their titles to the lands.

Upon the application of the Northern Pacific Railroad Company lands which had been entered before January 1, 1898, for which patents were issued *after* January 1, 1898, were directed to be treated, by the Secretary of the Interior, as covered by the provisions of the Act of July 1, 1898.

(See Regulations, 28 L. D., 470, 471.)

This action was taken June 3rd, 1899, upon the application of the Northern Pacific Railroad Company before its conveyance to the Northern Pacific Railway Company of the lands

in Minnesota, which conveyance was made December 21st, 1899.

(Exhibit No. 43, R. p. 478.)

It is submitted that a Court of Equity will not hold that a person who, by purchase of land prior to January 1, 1898, acquired the right under the statute of July 1, 1898, to hold the land, *lost his right to the land by the after issue of a patent to him, and that he holds such patent in trust for the railway company.*

D. The lands entered under the Timber and Stone Act.

This statute provides that a person, to avail himself of the provisions of the Act, shall file with the Register a written statement, in duplicate, to be verified by his oath, one of which is to be transmitted to the General Land Office, designating the particular tract he desires to purchase, and containing the statements required by the statute to be set forth. Upon filing the statement, the Register is to post in his office, for sixty days, a notice of the application, and the applicant is to cause a copy of such notice to be published for a like period of time in a newspaper published nearest to the land, and furnish to the Register, after such period, proof of the publication and proof of the character of the land, and upon payment to the proper officer of the purchase money of said land, and the fees of the Register and Receiver, *"the applicant may be permitted to enter said tract, and on the transmission to the General Land Office of the papers and testimony in the case a patent shall issue thereon.* Provided, that any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claims thereto, and evidence shall be taken, and

the merits of said objection shall be determined by the officers of the Land Office, subject to appeal, as in other land cases."

2 Comp. Stat. 1891, p. 1545.
20 U. S. Stat. pp. 89, 90.
Amended 27 U. S. Stat. p. 348.

A person becomes a beneficiary under this statute when his entry of the land is made prior to January 1, 1898, although "the papers and testimony in the case" may not be transmitted to the General Land Office until after January 1, 1898. He *may settle upon the land upon such an entry and hold the land as purchaser or settler or claimant.*

E. Lands acquired under the Homestead Law.

This statute requires the applicant to make and file in the proper land office the verified declaration required by the terms of the Act, "and upon filing such affidavit with the Register or Receiver, on payment of five dollars when the entry is not of more than eighty acres, and on payment of ten dollars when the entry is of more than eighty acres, he or she *shall thereupon be permitted to enter the amount of land specified.*"

No certificate or patent shall be issued until five years from the date of such entry, and at the expiration of the five years, or within two years thereafter, upon proof of the facts of residence upon the land and other facts required by the statute, the homesteader "shall be entitled to a patent as in other cases provided by law."

The law further provides that a party who has entered the land under the homestead law may pay the minimum price for the land at any time after fourteen months from the date of

such entry, upon making proof of settlement, residence and cultivation for such period of fourteen months.

2 Comp. Laws, 1901, pp. 1388, 1389, 1390, 1406, 1410.

Revised Statutes U. S., Secs. 2289, 2290, 2291, and 2301, as amended 26 U. S. Stat., pp. 1098, 1099, Chap. 561.

Under this statute a party becomes entitled to the benefits of the Act of July 1, 1898, when he enters the land, by filing in the land office the required affidavit and settles upon the land in pursuance of such entry prior to January 1, 1898, whatever part of the five years may remain to be completed after January 1, 1898. He also is entitled to the benefits of said Act if, having made the entry and settlement prior to July 1, 1898, he continues his settlement and to improve and cultivate the land for the period of fourteen months and then pays the minimum price of the land, although such payment be made after January 1, 1898. By his entry and settlement he became entitled to the land by either a residence on the land, and cultivation for five years, or by settlement, cultivation and improvement for fourteen months and payment of the minimum price. His entry and settlement, cultivation and improvement for fourteen months gave him a right to the land on payment of the minimum price. His payment may be made by scrip as well as by money.

2 Comp. Laws 1901, p. 1514.

30 U. S. Stat. p. 274, 275, Sec. 2, 3, 4.

In administering the Act of July 1, 1898, the inquiry of the Secretary of the Interior would be whether the entry and settlement were made prior to January 1, 1898.

It is the fact that the land has been settled upon or claimed in good faith under color of title or claim of right under any

law of the United States prior to January 1, 1898, which entitles him to the benefit of the Act.

The declaration filed by him in the local land office under the provisions of the homestead law authorizes his settlement upon the land and constitutes his color of title. He has a fixed claim of right to the land. So, also, the entry made under the Timber and Stone Act constitutes a color of title and claim of right to one who settles upon or claims the land in good faith under such entry.

Nelson vs. Northern Pacific Railway Co., 188 U. S., 108, at 121, 122.

Sturr vs. Beck, 133 U. S., 541, at 548.

Bardon vs. Northern Pac. Railroad Co., 145 U. S., 535, at 539, 540.

Whitney vs. Taylor, 158 U. S., 85, at 92.

Hastings, &c., R. Co. vs. Whitney, 132 U. S., 357, at 363.

In Nelson vs. Northern Pac. Railway Co., 188 U. S., 108, Nelson settled upon unsurveyed land prior to the definite location of the line of the railroad. When the land was surveyed he applied to enter it under the homestead laws, but was refused because, in the opinion of the local land officers, it conflicted with the grant to the Northern Pacific Railroad Co. The railroad company obtained a patent for the land and brought suit to recover it from Nelson. Deciding the case against the railway company, the Court held (pp. 121, 122,) that Nelson's settlement upon the land with intent in good faith to acquire it as a homestead, constituted "*a claim upon the land*" within the meaning of the grant of 1864 to the railroad company of the alternate odd sections to which the United States had full title "and free from pre-emption *or other claims or rights*, at the time the line of the road is definitely fixed."

If such a settlement upon land constituted a claim at the time the definite line of the railroad was fixed within the Act of 1864, a settlement upon land under a homestead declaration, or entry under the Timber and Stone Act prior to January 1, 1898, must constitute a claim within the Act of July 1, 1898, and bring the claimant within its protection, although the final evidence of title be not given till after January 1, 1898.

F. Lands located with scrip under the acts referred to in the bill of complaint. (Rec. p. 10.)

The Acts are Chapter 81 of 11 U. S. Stat., p. 294, and Chapter 83 of 10 U. S. Stat., p. 304.

Under the first of these statutes the person entitled to locate land makes application for land at the local land office. The Register enters the location and makes out for "such claimant, or his legal representatives (as the case may be) a certificate of location which shall be transmitted to the Commissioner of the General Land Office." and if it appears to the Commissioner that the certificate has been fairly obtained, patent is to issue for the land so located.

A person who in good faith locates land under this statute prior to January 1, 1898, is entitled to the benefits of the Act of July 1, 1898, *although the location is not approved by the issue of a patent until after January* 1, 1898. If he settled upon the land under such location prior to January 1, 1898, in good faith, believing his location gave him a right to the settlement, he would, by such settlement, be within the specific terms of the Act in respect to settlers upon the land. His location constitutes his color of title or claim of right.

By the second Act referred to above (10 U. S. Stat., p. 304,) scrip is issued which entitles the holder to locate land.

While the statute does not prescribe the manner of the location as in the case of the former statute, the practice of the Land Department is the same in respect to location by means of such scrip, and the locator settling upon the land in good faith at the date of his location, prior to January 1, 1898, would be entitled to the benefits of said Act of July 1, 1898. His settlement under a location so made would be under color of title or claim of right under a law of the United States.

9th. The entries of the lands in question under which the defendants claim the lands.

First. The bill of complaint states (paragraph XI and XII, pp. 9, 10, 11 and 12,) that long after the definite location and construction of the railroad, "and at divers times *subsequently to August* 1, 1893, all of the lands described in said Exhibit A hereto annexed were wrongfully and unlawfully permitted *by the proper officers of the Land Department of the United States* to be entered under various land laws of the United States, and final certificates of such entries were issued to the several persons entering the same. That the dates and character of said several entries are as specified in said Exhibit A. * * * That the words *cash entry* are used to describe a private entry and cash purchase of lands such as is authorized by law with reference to lands which have been offered at public sale, and not subsequently reserved or withdrawn; the word *homestead* is used to designate an entry of lands made under Section 2289 of the Revised Statutes of the United States. The lands referred to in said Exhibit A as having been located with Scrip 779B, issued by the Surveyor General of New Orleans, or by Scrip 183, State of Louisiana, were entered by scrip issued under the Act of Congress entitled, 'An Act to provide for the location of certain confirmed private

land claims in the State of Missouri, and for other purposes,' approved June 2, 1858. That the lands referred to in said Exhibit A as entered with Sioux Half Breed Scrip, were entered or located with scrip issued under the provisions of the Act of Congress, entitled, 'An Act to authorize the President of the United States to cause to be surveyed the tract of land in the Territory of Minnesota belonging to the Half Breeds or mixed blood of Dacotah or Sioux Nation of Indians, and for other purposes,' approved July 17, 1854. That the several persons named in the said Exhibit A as grantees are persons to whom the lands, of which they are described as the grantees, have been conveyed by deed in due form, from the entryman of said lands. * * * That as to any descriptions of land mentioned in said Exhibit A with respect to which the date (of) the character of the entry is not specified, the date and character of such entry or entries is to your orators unknown. That the only lands with respect to which, so far as your orators are advised, patents have been issued, upon the pretended entries referred to in Exhibit A, are those with respect to which the date of the patent is specified in the fourth or last column of said Exhibit. * * * That but for the vested rights of the said Northern Pacific Railroad Company and its grantees in the several tracts of land described in Exhibit A, the said lands would, at the several dates of the respective alleged entries thereof described in said Exhibit A, have been unappropriated public lands of the United States open to the several kinds of entries or location, made, or pretended to be made, with respect to them severally, as shown in Exhibit A, and that the several applications and proceeding with respect to the said several entries were in due form, and regularly conducted as required by law, and in the absence of the vested rights of the said Northern Pacific Railroad Company and its grantees in the said premises, would have been operative and effectual to invest the several entryman of said lands with

complete equitable title thereto, each of such entries and locations *having been finally receipted for, allowed and approved by the proper land officers of the United States.*"

By these statements the bill shows *that all the lands were entered under a law of the United States.*

Said Exhibit A shows that there are cash entries, homestead entries, and scrip entries, which were made prior to January 1, 1898, in cases where no patents have been issued. As to all such entries the bill shows that they are clearly within the provisions of the Act of July 1, 1898, and subject to the administration of the Act by the Secretary of the Interior. The bill states in reference to that Act as follows (paragraph IX, p. 8): "That down to the time of the execution and delivery of the said deed from the Northern Pacific Railway Company to your orators, the Honorable Secretary of the Interior of the United States had not, nor has he at any time heretofore, caused to be prepared or delivered to either of the said railroad companies, or to anyone, a list or lists of any of the tracts which had been purchased or settled upon, or occupied, opposite to or along any portion of the line of road of said Northern Pacific Railroad Company east of Thompson Junction aforesaid, as provided by the Act of Congress, entitled, 'An Act making appropriations for sundry civil expenses of the government, for the fiscal year ending June 30th, 1899, and for other purposes,' approved July 1st, 1898."

In this manner the bill of complaint brings into the case the Act of July 1, 1898, and gives as the reason why it does not apply to all these entries, which it avers were all made after August 1, 1893, *that the Secretary of the Interior had not, before the conveyance by the railway company to the complain-*

ants, caused to be prepared or delivered a list of the lands covered by said Act.

There is no claim or statement in the bill of complaint that any portion of the lands were purchased, entered or settled upon subsequent to January 1, 1898, or that there is any portion of the lands which do not come within the provisions of said Act of July 1, 1898.

Second. Said Exhibit A of the bill states that a portion of the lands were patented, giving the dates of the patents, some of which dates are prior to January 1, 1898, and some are subsequent.

In respect to all the patented lands, whether the patents are dated prior or subsequent to January 1, 1898, Exhibit A shows that the patents were *upon cash entries made before January* 1, 1898, except in six instances. In respect to those six instances complainants' Exhibit 26 (R. pp. 418 to 429) shows that the *date of sale in each case upon which the patent issued was prior to January* 1, 1898.

It thus distinctly appears by the bill and the complainants' evidence that all the lands for which patents have issued were lands "purchased directly from the United States" by "cash entries," or by "sales" *prior to January* 1, 1898, and come within the provisions of the Act of July 1, 1898.

Third. The lands for which patents have not issued.

The only evidence in the case in respect to the date or character of the entries of the lands which have not been patented is the complainants' said Exhibit 26 (R. pp. 418 to 429) offered at pages 180, 181. The exhibit is a transcript of tract books of the local land office at Duluth.

The exhibit does not show the character of the original entry of the land in any case. While the bill and Exhibit A state that some of the entries were made under the homestead law,

some of them were made under scrip issued under 11 U. S. Stat.. p. 294, and 10 U. S. Stat.. p 304. and some were *cash entry,* that is, "private entry and cash purchase lands such as is authorized by law with reference to lands which have been offered at public sale, and not subsequently reserved or withdrawn," said Exhibit 26 does not show any such entries. In a column headed "Date of Sale," it simply gives certain dates, and in another column headed "Number of Receipt and Certificate of Purchases" gives other dates. *Whether these sales referred to in said Exhibit were under the Timber and Stone Act, or were under the homestead law and made after a settlement residence and improvement for fourteen months, or were under said statutes allowing the acquiring of lands upon scrip, is not shown by the exhibit.*

Fourth. The bill states that all the entries were made "*subscquently to August first,* 1893," and that "cash entry," described in Exhibit A, (which exhibit describes all the entries as cash entries, except fifteen entries,) is a "purchase of lands such as is authorized by law with reference to lands which have been offered at public sale and not subsequently reserved or withdrawn."

The law which authorized *such purchases* was Section 2357 of the Revised Statutes. This law was repealed by Act of March 2, 1889, Chap. 381, 25 U. S. Stat., 854.

2 Comp. Laws 1891, p. 1445.

No such purchases as are specified in the bill as "cash entry" could have been made.

The entries under which the defendants claim the lands were either under the homestead law or the Timber and Stone Act, instead of under the law referred to by the bill. If entered under the homestead law, or the Timber and Stone Act, the date of the original entry is not stated in the bill of complaint nor is shown by the evidence.

Fifth. The statement of the certificate of the Circuit Court of Appeals, in paragraphs IV and V (R. p. 864), of the quantity of lands "entered" prior to January 1, 1898, and the quantity of lands "entered" since January 1, 1898, is based upon the said Exhibit 26; since that exhibit is the only evidence in the case upon the subject.

The statement of the certificate does not take into account that it is not the formal entry of the land denominated by the term *sale*, as described in said Exhibit 26, which entitles a party to the benefit of the Act. It is purchase, or settlement, or claim made in good faith under color of title or claim of right, prior to January 1, 1898, which gives the right to such benefit. The formal entry may be made after that date and not affect the right to the benefit which had been before acquired.

Sixth. The defendants' answer, by paragraph VI (page 50), denies that the lands were wrongfully and unlawfully permitted by the officers of the Land Department to be entered, and avers that at the date of the several entries the lands were vacant public lands subject to entry; that the said alleged selections of the lands by the railroad company had never been approved by the Secretary of the Interior, and had been cancelled, and the lands made subject to entry and settlement.

Paragraph VIII (pp. 51, 52,) sets up the ruling of the Secretary of the Interior by which the lands were opened to entry and settlement, and states that "after the restoration of these lands to the public domain, the lands in which these defendants are interested were under the land laws of the United States duly and legally entered, and *each and every location was previous to January* 1, 1898, and after such location such proceedings were taken by said locator that a certificate was issued in the usual form to said locator, and in some cases patents were issued thereon for said lands. * * * That said locators

were each actual and bona fide settlers over the age of twenty-one years and citizens of the United States."

Paragraph IX (p. 53) of the answer avers the acceptance and adoption of the Act of July 1, 1898, by the Northern Pacific Railway Company and states the proceeding taken by the Secretary of the Interior to administer the act, and avers (p. 57), "that all the land claimed by the defendants in this controversy come within the provisions of the Act of Congress of July 1, 1898, and the rules and regulations of the Land Department governing the same."

Seventh. The evidence shows these facts, viz.: That the selections of the lands by the railroad company were never approved by the Secretary of the Interior, but were cancelled by him, and the lands were opened to entry and settlement. (Exhibit 30, R. pp. 429. 430. 431); that the defendants claim to have entered the lands under this ruling of the Secretary of the Interior; that the Secretary of the Interior has restored the lands to the records of the Land Department to be considered by the department and adjustment be made between the railway company and the claimants of the lands under the land grant to the railroad company *and the Act of July* 1, 1898.

Exhibits 31 and 32, Rec. pp. 431, 432, 433.

The questions of the rights of the parties under both laws are now pending before the Secretary, and he is engaged in administering the laws.

Exhibit K, Rec. p. 737.

Exhibit H, Rec. pp. 665, 666, 667.

Northern Pac. Railway Co., 29, L. D., 316, 317, 318.

The jurisdiction to determine the facts which determine the

rights of the parties under the Act of July 1, 1898, in respect to the dates and character of their claims, as well as the rights of the railway company to the selections of the lands under the land grant, is vested in the Secretary of the Interior.

The Act provides "that the Secretary of the Interior shall, from time to time, ascertain. and as soon as conveniently may be done, cause to be prepared and delivered to the said railroad grantee. or its successors in interest, a list or lists of the several tracts which have been purchased or settled upon, or occupied as aforesaid and are now claimed by said purchasers or occupants, their heirs or assigns, according to the smallest government subdivision."

It further provides, "that the railroad, grantee, or its successors in interest shall accept the said list or lists so made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it."

The jurisdiction to determine what tracts come within the provisions of the Act, by purchase, settlement or occupation, and which shall be relinquished by the railroad company is exclusively vested in the Secretary of the Interior.

The Circuit Court in which this suit is brought can not take that jurisdiction from the Secretary.

The question of the jurisdiction of the Court in this case is discussed and authorities are cited, under Point XI, page 87 of this brief, to which attention upon the subject is invited.

10th. It is respectfully submitted that the adjustment of the rights of the parties should be remitted to the Secretary of the Interior under the construction which shall be given by this Court to the Act of July 1. 1898, in respect to the questions raised upon the effect of the acceptance of the Act by the Northern Pacific Railway Company, the conveyance of the lands by the company to the complainants, the purchase, settlement and claims made to the lands prior to January 1,

1898, which give to the defendants the right to protection under said Act. and the existence of such rights in cases where patents have been issued.

Germania Ins Co. v United States, 165 U.S., 379 at 382

VI.

The railroad company acquired no title to the lands by filing the selection lists.

Title to lands within either the first or second indemnity limits of the grant is not acquired by the railroad company unless and until the selections made by the railroad company are approved by the Secretary of the Interior

The question is not whether, as stated by the complainants, the selections were "defeated by the subsequent entrymen by failure of the Secretary of the Interior to approve them.",

The question is as to the title of the railroad company before the selections are approved.

Section 3 of the Act of July 2nd, 1864, granting lands to the Northern Pacific Railroad Company (13 U. S. Stat.. p. 367) provides: "That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns * * * * * *every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile, on each side of said railroad, whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat

thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, *under the direction of the Secretary of the Interior,* in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

The fact that directions have been given by the Secretary of the Interior for making and presenting lists of selections, and that those directions have been followed, does not dispense with the approval of the selections by the Secretary in order that the railroad company may have either an equitable or legal title to the lands. There is no distinction in respect to the requirement that the selections shall be approved by the Secretary of the Interior, arising from the fact that in some of the land grants made to aid in the construction of railroads, the provision for selection is that the selection is to be made *subject to the approval of the Secretary of the Interior,* while in other grants the provision is that *the Secretary of the Interior is to cause the indemnity lands to be selected,* and in still other grants, as in the case of the grant to the Northern Pacific Railroad Company, the provision is that the lands are to be selected *under the direction of the Secretary of the Interior.*

Whether the provision of the grant is in the one or the other of these forms of expression, the purpose of the grant in each case is that the selection must receive the approval of the Secretary of the Interior as a condition of acquiring title under the selections, and that no title passed to the railroad company in either case until the approval is made. *Until* approval is made, the title remains complete in the United States.

Ryan vs. Railroad Co., 99 U. S., 382, 386.

Kansas Pacific R. Co. vs. Atchison R. Co., 112 U. S., 414, 419.

Sioux City R. Co. vs. Chicago Railway, 117 U. S., 406, 407.

Wisconsin Cen. R. Co. vs. Price Co., 133 U. S., 496, 512.

United States vs. Missouri, &c., Ry., 141 U. S., 358, 367, 374, 375. 376.

Southern Pac. R. Co. vs. Bell, 183 U. S., 675.

Groeck vs. Southern Pac. R. Co., 183 U. S., 690.

Oregon & Cal. R. R. Co. vs. United States, 189 U. S., 103.

Clark vs. Herington, 186 U. S., 206, at 209.

Northern Pacific R. Co., 2 L. D., 820.

Northern Pacific R. Co. vs. Miller, 7 L. D., 100, 123, 124.

Northern Pacific Rd. vs. Walters, 19 L. D., 230 at 235, 236.

Northern Pacific R. R. Co. vs. Blain, 27 L. D., 361, 363.

Meister vs. St. Paul, Minneapolis & Manitoba R. Co., 14 L. D., 624, 626.

Walker vs. Southern Pacific R. R. Co., 24 L. D., 172, 173.

Oregon & California R. R. Co., 28 L. D., 363.

Southern Pacific R. Co., 28 L. D., 281.

Oregon & California R. Co. vs. Bales, 28 L. D., 231, 232, 233.

Grandin vs. La Bar, 57 N. W., 241 at 244, 247 (N. D.)

Southern Pacific R. Co. vs Wood, 57 Pac., 388, (Cal.)

Resser vs. Carney, 54 N. W., 89, (Minn.)

Northern Pac. R. Co. vs. Fly, 27 L. D., 464 at 466.

Dunnigan vs. Northern Pac. R. Co., 27 L. D., 467 at 468.

Musser vs. McRae, 38 Minn., 408.
38 N. W., 103.

Musser vs. McRae, 44 Minn., 343.
46 N. W., 673.

Elling vs. Thexton, 16 Pac., 931 at 936 (Mont.)

Jackson vs. La Moure County, 46 N. W., 498 (N. D.)

A. The decisions of the Supreme Court.

In Ryan vs. Railroad Company, 99 U. S., 382, 386, the language of the grant is that the lands "shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior." The decision in that case was with respect to the lieu lands; that the right to them "attached to no specific tracts until the selection was actually made *in the manner prescribed.*"

In the case of Kansas Pacific R. R. Co. vs. Atchison R. R. Co., 112 U. S., 414, 419, the language of the grant is: "It shall be the duty of the Secretary of the Interior to select," the Court held in this case that no title could be acquired in specific indemnity lands "*until actual selection.*"

In Sioux City R. R. Co. vs. Chicago Railway, 117 U. S., 406, 407, the language of the grant is that the lands "should, by the Secretary of the Interior, be caused to be selected." In this case, after stating "that in respect to the lands within the primary limits, the location of the road fixed the right of the company to such sections," the Court say (p. 408): "But no title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, *and the selection made approved by the Secretary of the Interior.*"

In Wisconsin Central R. R. Co. vs. Price County, 133 U. S., 496, 512, the language of the grant is that the lands shall be selected "subject to the approval of the Secretary of the Interior."

In this case the lands within the indemnity limits of the

railroad company had been selected in the place of lands which had been disposed of by the United States prior to the date of the grant made to aid in the construction of the road. The Secretary of the Interior refused to approve of the selections on the ground that under the decision of the Court in the case of Leavenworth, etc., R. R. vs. United States, 92 U. S., 733, the railroad company was not entitled to select indemnity lands in the place of such lands as had been disposed of by the United States prior to the grant. It was on this ground alone that the Secretary of the Interior refused to approve the selections. No patent had been issued for the lands, and while they stood in this condition they were assessed for taxes. The suit was brought to set aside the tax assessment. The taxes were for the year 1883. Afterwards, and in 1884, a patent was issued for the lands to the railroad company by the State of Wisconsin, to whom the land grant ran; after the issuing of such patent the suit was brought. The question in the case was whether the railroad company had such title to the lands that they might be taxed under the laws of Wisconsin.

In deciding the case, Justice Field says, on page 505: "That where Congress has prescribed the conditions upon which portions of that domain (public domain) may be alienated, and provided that upon the performance of the conditions a patent of the United States shall issue to the donee or purchaser, and all such conditions are complied with, the land alienated being distinctly defined, it only remaining for the government to issue its patent, and until such issue holding the legal title in trust for him, who in the meantime is not excluded from the use of the property—in other words, when the government has ceased to hold any such right or interest in the property as to justify it in withholding a patent from the donee or purchaser, and it does not exclude him from the use of the property—then the donee or purchaser will be treated as the bene-

ficial owner of the land, and the same be held subject to taxation as his property."

It thus appears distinctly that land may be subject to taxation, where, as between the government of the United States and the individual or corporation, the individual or corporation is the equitable owner of the land.

The Court held that the decision of the Secretary of the Interior, that indemnity selections could not be made on account of the lands disposed of by the government prior to the grant, was error, *but the Court held that until selection of indemnity lands was made and that selection was approved by the Secretary of the Interior, there was no selection; the approval of the Secretary of the Interior was necessary to constitute any selection at all.*

Upon this subject the Court say (pp. 511, 512):

"For such lands no title could pass to the company, not only until the selections were made by the agents of the State appointed by the Governor, but until such selections were approved by the Secretary of the Interior. The agent of the State made the selections, and they had been properly authenticated and forwarded to the Secretary of the Interior. But that officer never approved of them. *Nor can such approval be inferred from his not formally rejecting them.* He refused, as already stated, to issue to the company any patents for any more lands, insisting that it had already received over 40,000 acres too much, and he directed the Commissioner of the General Land Office to require the company to restore this excess to the government. *The approval of the Secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial, but judicial. He*

was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions, he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and if so, what portion had been thus appropriated, and what portion still remained. *This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title.* Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. *But such promise passed no title, and until it was executed, created no legal interest which could be enforced in the Courts.* The doctrine, that until selection is made no title vests in any indemnity lands, has been recognized in several decisions of this Court. Thus in *Ryan* vs. *Railroad Co.*, 99 U. S., 382, 386, in considering a grant of land by Congress, in aid of the construction of a railroad,

similar in its general features to the one in this case, the Court said: 'Under this statute, when the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the lieu lands, as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed.' And again, speaking of a deficiency in the land granted, it said. 'It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was, for that purpose.' The selection had not been approved by the Secretary."

It will be observed that in deciding this case where the holding is so distinct that in order to be of any effect to pass title, the selections must have the approval of the Secretary of the Interior, reference is made to the decision in the case of *Ryan* vs. *Railroad Co.*, 99 U. S., 382, 386, where, as pointed out, the language of the statute is different, and that no distinction is made by the Supreme Court between the two cases.

In the case of United States vs. Missouri, Kansas, &c., Railway Co., 141 U. S., 358, at 367, 374, 375, 376, the question in the case was whether the United States had the title to the lands or whether the railroad company had acquired the title. The language of the grant is that, "It shall be the duty of the Secretary of the Interior to cause to be selected."

In deciding this case no distinction is made between the language of the grant in this case and the language of the grant which was involved in the case of Wisconsin Central Railroad Co. vs. Price County.

In the opinion of the Court (pp. 374, 375, 376,) after stating in reference to the indemnity lands that no rights had

attached to them before their selection, with the approval of the Secretary of the Interior, the Court proceeds as follows: "We say, prior to such selection and approval, because as to lands which may legally be taken for purposes of indemnity, the principle is firmly established that title to them does not vest in the railroad company, for the benefit of which they are contingently granted, but, *in the fullest legal sense, remains in the United States, until they are actually selected and set apart, under the direction of the Secretary of the Interior, specifically for indemnity purposes.* It was so held in *Kansas Pacific Railroad Co.* vs. *Atchison Railroad*, 112 U. S., 414, 421, in which the Court, referring to the above Act of 1863, said in reference to the lands in the indemnity limits: 'Until selection was made the title remained in the government, subject to its disposal at its pleasure. * * * The grant to Kansas, as stated, conferred only a right to select lands beyond ten miles from the defendant's road, upon certain contingencies. It gave no title to indemnity lands in advance of their selection.' The same principle was announced in *Barney* vs. *Winona & St. Peter R. R.*, 117 U. S., 228, 232, where the Court said: 'In the construction of land grant Acts in aid of railroads, there is a well established distinction observed between 'granted lands' and 'indemnity lands.' The former are those falling within the limits specially designated and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the land department, as of the date of the Act of Congress. The latter are those lands selected in lieu of parcels by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection.' So in *Sioux City &c., Railroad* vs. *Chicago, Milwaukee, &c., Railway*, 117 U. S., 406, 408: 'No title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the

Secretary of the Interior.' But the fullest and most recent expression of opinion upon this question by this Court is in *Wisconsin Cent. Railroad* vs. *Price County*, 133 U. S., 496, 511, where it was said: 'He (the Secretary) was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions, he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. * * * * *Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title.* Until then the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, *created no legal interest which could be enforced in the Courts.*"

It will be observed that in this last case, making no distinction between the terms of the different grants, reference is made to the cases of *Kansas Pacific Railroad* vs. *Atchison Railroad*, 112 U. S., 414, and *Sioux City, &c., R. R.* vs. *Chicago. &c., Railway*, 117 U. S., 406, 408, and that extensive quotations are made from the Price County case, in which the language is distinct that "until the selections were approved there were no selections in fact, only preliminary pro-

ceedings taken for that purpose; and the indemnity lands remained unaffected in their title."

There is also quoted from the Price County case a statement of the Secretary of the Interior, showing the acts required to be done for the proper disposition of the lands which constitute judicial action by the Secretary of the Interior.

In Southern Pacific R. R. Co. vs. Bell, 183 U. S., 675, the railroad company sought to establish title under its grant of lands within the indemnity limits which had been patented to Bell.

The grant to the Southern Pacific Railroad is in the same terms as the grant to the Northern Pacific Railroad. An order was made by the Land Department withdrawing the lands within the indemnity limits from sale or location, pre-emption or homestead entry, on filing the plat of definite location of the road, in 1867.

The land in question was patented to Bell September 15th, 1892. The railroad company selected the land July 26th, 1893.

In deciding the case against the railroad company, the Court, Mr. Justice Brown delivering the unanimous opinion, after holding that the lands within the indemnity limits did not come within the designation in the statute of "land hereby granted;" that "to lands within the indemnity limits the company takes no title until a deficiency in the place limits has been ascertained, and the company has exercised its right of selection;" that there was no power in the Land Department under the grant to withdraw the lands within the indemnity limits from sale, pre-emption or homestead entry, concludes in the following language (p. 238): "We are therefore of opinion that the Act of July 27, 1866, did not authorize the withdrawal by the Secretary of the Interior of the Indemnity

lands, that such lands remained open to homestead and pre-emption entry, and that patents issued to settlers within such indemnity limits, based upon the entries made prior to the selection by the railroad company, *approved by the Interior Department*, were valid as conveyances of the land as against the selection by the railroad company."

In Clark vs. Herington, 186 U. S., 206, the court had under consideration the grant to the Union Pacific Railroad Company (14 U. S. Stat., 289) in which it was provided that the Secretary of the Interior "cause to be selected" the indemnity lands. The Court, by Mr. Justice Brewer, say (p. 209): "It is familiar law that no title to indemnity lands is vested until an approved selection has been made, and that up to such time Congress has full power to deal with lands in the indemnity limits as it sees fit."

In Oregon & Cal. R. Co. vs. United States, 189 U. S., 103, the Court passed upon the right of the railroad company to indemnity lands under the grant made under 14 U. S. Statutes, 239, which grant as in the grant to the Northern Pacific Railroad Company, provided for the selection of indemnity lands "under the direction of the Secretary of the Interior." Mr. Justice Harlan delivering the unanimous opinion of the Court says: "Now it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd numbered sections within its place or granted limits—which interest relates back to the date of the granting act, the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the Land Department; and then it relates to the date of the grant." After citing cases among which is Wisconsin Cent. R. Co. vs Price County, 133 U. S., 496, at 508, 513,

Justice Harlan says: "It-

is to be taken as established that, unless otherwise expressly declared by Congress, no right of the railroad company attaches, or can attach to specific lands within indemnity limits until there is a selection under the direction or with the approval of the Secretary."

B. The decisions of the Secretaries of the Interior.

In Northern Pacific Railroad Company, 2 L. D., 820, the decision was upon the grant to the Northern Pacific Railroad Company. It is addressed to the Special Timber Agent, by Acting Commissioner Harrison, of date May 26th, 1883, and says: "Referring to your communication of the 8th instant, in relation to the taking of timber from indemnity limits by the Northern Pacific Railroad Company, you are advised that until lands within such limits have been selected by the company, *and the selection so made has received the approval of this office*, said company have no right to enter thereon and take timber, further than so much as they may require for construction purposes. The taking, therefore, of timber to be applied to other uses, prior to the time indicated, would constitute a trespass upon the part of the company."

In Northern Pacific Railroad Company vs. Miller, 7 L. D., 100, the decision was upon the same ground and was made in a very carefully expressed opinion, by Secretary Vilas, and is of date August 2nd, 1888, in which the Secretary held that a selection of land made by the railroad company from the indemnity limits was not valid until approved by the Secretary of the Interior. He uses the following language (pp. 123, 124): "The selection must be one which is both well founded in the necessity for it and the manner of making it, and, therefore, one within the direction and approval of the Secretary

of the Interior. In this case the original selection list gave no indication of the basis upon which a right of selection of this tract could be claimed. It proceeded upon the assumption that the company might 'select' as many lands as it saw fit, and make proof of its losses afterwards. This practice was, indeed, permitted for some time in the General Land Office, and thus it has happened that some railroad companies have selected, in lieu of lost lands, and procured certification of lands much in excess in acreage of their losses for which the selections were admissible. It was also specially allowed in the case of this company. But it was so allowed only upon condition that the basis was subsequently to be supplied, and no selection was valid *until approved after such basis should be determined.* It was thus only a question of the order of procedure."

"This practice was of doubtful validity, at least to give a right from date of first selection, and was changed some time since, by departmental regulation. The Act is explicit that, whenever, prior to the definite location of the line, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted, or otherwise disposed of, other lands shall be selected by said company *in lieu thereof,* under the direction of the Secretary of the Interior, etc., etc."

"Manifestly, it was necessary to point out the section, or the part of a section which had thus been lost to the grant, and the manner of its loss, in order to authorize the taking of another tract of land in place of it. The department ought, before approval of a selection, first to determine whether the land lost to the grant was so previously appropriated as to furnish the basis of a selection, and it ought to be particularly shown for what specific lands lost, specific selections were made. Until these facts appear, the company has not estab-

lished the right to appropriate from the body of lands open to its choice but is confined to those specifically granted."

"In accordance with this rule, my predecessor (Mr. Lamar), on the 4th of August, 1885, approved a circular from your office to the local officers, in which they were directed as follows:"

Before admitting railroad indemnity selections in any case, you will require preliminary lists to be filed, specifying the particular deficiencies for which indemnity is claimed. * * * Where indemnity selections have heretofore been made without specification of losses, you will require the companies to designate the deficiencies for which such indemnity it to be applied, before further selections are allowed.

"It was in obedience to the last clause that this company filed, on the 25th of October, 1887, the list of particular deficiencies upon which the claim of selections in list number two before mentioned was based. That list excellently illustrates the necessity for the rule mentioned. Since 1883 the claim of this company to take the 58,000 acres in list number two has remained a cloud upon all the lands embraced within it. Yet, when called upon to specify particular lands lost from the granted limits, for which such a right of selection can exist, only 4,011 acres are shown, except by claiming indemnity for about 55,000 acres of lands, for the most part not particularly defined, lying within the Yakima Indian Reservation."

In Northern Pacific Railroad Company vs. Walters, 13 L. D., 230 at 235, 236, Secretary Noble, in holding the approval of the Secretary necessary to the selections under the same grant, quotes from the case of Wisconsin Central Railroad Co. vs. Price County, 133 U. S., 496, that *"until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the in-*

demnity lands remained unaffected in their title."

In Northern Pacific Railroad Company vs. Blain, 27 L. D., 361, 363, the decision is upon the grant to the Northern Pacific Railroad Co., and is distinct that the company obtains no right to lands within the indemnity limits until the selection has been made and the same has been approved.

In Meister vs. St. Paul, Minneapolis & Manitoba R. R. Co., 14 L. D., 624, 626, claim was made to the lands in question by the Northern Pacific Railroad Co. under its grant. The decision involved the construction of that grant. The decision is by Secretary Noble, and holds that the approval of the selection by the railroad company is necessary, and refers to the case of Wisconsin Central Railroad Co. vs. Price County, 133 U. S., 496, and of United States vs. Missouri, &c., Railway Co., 141 U. S., 358, 376, and quotes from the Price County case that, *"The approval of the Secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected."*

In Walker vs. Southern Pacific Railroad Co., 24 L. D., 172, 173, the decision was under the grant to the Southern Pacific Railroad Co., the terms of which are the same as in the grant to the Northern Pacific Railroad Co., providing that the selection of the indemnity lands is to be made by the company, "under the direction of the Secretary of the Interior." (14 U. S. Statutes, 294.)

The decision is by Secretary Francis, and after quoting from the case of Wisconsin Central Railroad Co. vs. Price County, which quotation has been made above, the Secretary adds (p. 174): *"The doctrine thus authoritatively declared has been*

recognized in other decisions of the same Court and stands today as law upon the point under discussion. In this case no approval of the Secretary has been given to the company's selection."

In Oregon & California Railroad Co., 28 L. D., 363, the decision is by Secretary Hitchcock, under a grant to aid in the construction of a railroad and telegraph line of the Central Pacific Railroad in California, to Portland, Oregon. The provision in regard to the selection within indemnity limits is the same as in the grant to the Northern Pacific Railroad Co., viz.: The selection is to be made by the company "under the direction of the Secretary of the Interior." (14 U. S. Statutes, 239, 240.)

The Secretary says (p. 365): "The right to indemnity conferred by the grant is merely a right to select public lands within designated limits, under certain contingencies, but no title to any particular land vested in the company *until after a selection had been made and approved.*"

The Secretary cites as authority for this position the case of Wisconsin Central Railroad Co. vs. Price County, 133 U. S., 496, and United States vs. Railroad Co., 141 U. S., 358.

In Southern Pacific Railroad Co., 28 L. D., 281, the decision is upon the selection of indemnity lands claimed under the grant to the Southern Pacific Railroad, which, as we have seen, is like the grant to the Northern Pacific Railroad Company on the subject of selection of lands.

The decision is upon the selection which had been made, but had not been approved. Referring to the proceedings under which the selection had been made, the Secretary says (p. 283): *"All that could have been acquired by such proceedings was merely the inchoate right to have its selection approved,"* then quotes a statement from Wisconsin Central

R. R. Co. vs. Price County, that "until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose." * * * "There are no selections in fact until after approval, and until a selection is made the title remains in the government, 'subject to its disposal at its pleasure.'"

In Oregon & California R. R. Co. vs. Bales, 28 L. D., 231, the decision is under the grant of lands to aid in the construction of a railroad and telegraph line from Portland to Astoria, in the State of Oregon, (16 U. S. Statutes, 94,) under which provision for the selection of indemnity lands was that the lands "shall be selected under the direction of the Secretary of the Interior."

In deciding the case, the Secretary says (p. 233): "Under repeated adjudications by the Courts and this department, no title passes to lands within the indemnity limits until they have been selected in the manner prescribed by the Act, *that is, until the company's selection has been approved by the Secretary of the Interior.*"

It will be observed from the above decisions of the several Secretaries of the Interior, from 1883 to 1897, the holding has been uniform upon the very terms of the grant of the Northern Pacific Railroad Company, that the selections of the indemnity lands conferred no title upon the railroad company until the selection was approved by the Secretary of the Interior, and by the making of the selections the railroad company gets no other right than to have the selections presented to the Secretary of the Interior for his approval.

C. The decisions made by the Secretaries of the Interior cited above, giving a construction to the Act, while they are administering the grant through a long series of years, are of

weight with the Court when called upon to decide the same question.

Knight vs. U. S. Land Association, 142 U. S., 161 at 178.
Heath vs. Wallace, 138 U. S., 573 at 582.
Hewitt vs. Schultz, 180 U. S., 139 at 156, 157.
Southern Pacific R. Co. vs. Bell, 22 Sup. Ct. Rep., 232.

In Heath vs. Wallace, 138 U. S., at 582, the Court, referring to the construction put upon a swamp land grant, says:

"Those adjudications covering a consecutive period of nearly nine years, and, so far as can be gathered from the printed reports of the decisions of that department relating to public lands, being the only ones bearing upon the subject, ought to be taken as showing conclusively the meaning attached to the phrase, 'land subject to periodical overflow,' by the officers of the department whose duty it is, and has been, to administer the swamp land grant. Moreover, if the question be considered in a somewhat different light, viz.: as the contemporaneous construction of a statute by those officers of the government whose duty it is to administer it, then the case would seem to be brought within the rule announced at a very early day in this Court, and reiterated in a very large number of cases, that the construction given to a statute by those charged with the execution of it, is always entitled to the most respectful consideration, *and ought not to be overruled without cogent reasons,* for as said in United States vs. Moore, 95 U. S., 760, 763, 'the officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.'"

In Hewitt vs. Schultz 180 U. S., at pp. 156 and 157, the

question was upon the construction of the Northern Pacific Railroad grant, whether, by the terms of the statute, the Secretary of the Interior had authority to withdraw the lands from public sale within the indemnity limits, the Supreme Court, following the decisions of the Secretaries upon that question, held that he had not such authority, and the Court says: "Of course, if the ruling of that office was plainly erroneous, it would be the duty of the Court to give effect to the will of Congress, for it is the settled doctrine of this Court that the practice of a department in the execution of a statute is material only when doubt exists as to its true construction. But without considering the matter as if it were for the first time presented, it is sufficient to say that the question before us cannot be said to be free from doubt. The intention of Congress has not been so clearly expressed as to exclude construction or argument in support of the view taken by Secretaries Lamar, Vilas and Smith, and upon which the land department has acted since 1888. 'It is the settled doctrine of this Court,' as was said in United States vs. Alabama Great Southern Railroad, 142 U. S., 615, 621, 'that in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.' These observations apply to the case now before us, and lead to the conclusion that if the practice in the land department could, with reason, be held to have been wrong, it cannot be said to have been so plainly or palpably wrong as to justify the Court, after the lapse of so many years, in adjudging that it had misconstrued the Act of July 2, 1864."

In Southern Pacific Railroad Co. vs. Bell, 183 U. S., at pages 684, 685, the Court refers to the case of Hewitt vs. Schultz, and says. "The Court rested its decision largely upon this concurrence of views and long continued practice of the Land Department, and summed up its opinion in the following words: 'If this were done' (that construction overthrown,) 'it is to be apprehended that great, if not endless, confusion would ensue in the administration of the public lands, and that the rights of a vast number of people who have acquired homes under the pre-emption and homestead laws, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed. If the practice in the Land Department could, with reason, be held to have been wrong, it cannot be said to have been so plainly or palpably wrong as to justify the Court, after the lapse of so many years, in adjudging that it had misconstrued the Act of July 2, 1864."

D. Decisions of the State Courts.

In Grandin vs. La Bar, 57 N. W., 241, (N. D.,) the question was distinctly presented whether one of the parties to the suit, who was a grantee of the Northern Pacific R. Co., had acquired title to the land in question, the railroad company's title depending upon a selection having been made by the Northern Pacific Railroad Company of indemnity lands, which selection had not been approved by the Secretary of the Interior. *The reasons why they had not been approved do not appear in the case.* The holding of the Court is distinct that no title passes until the Secretary approves the selection.

In Southern Pacific Railroad Co. vs. Wood, 57 Pacific, 388, decided by the Supreme Court of California in 1899, it is

held that in order to acquire title to indemnity lands under the grant to the Southern Pacific Railroad Co., the selection of the lands is required to be approved by the Secretary of the Interior, and cites upon this subject the decision of the Supreme Court in the cases of Ryan vs. Railroad Co., 99 U. S., 382, and Wisconsin Central Railroad Company vs. Price County, 133 U. S., 496.

In Resser vs. Carney, 54 N. W., p. 89, (Minnesota,) a warranty deed had been made by the Northern Pacific Railroad Company to one Paine; in 1879 Paine conveyed to Kindred, Kindred to Carney and Carney to plaintiff by warranty deed, in 1882. In 1887 the plaintiff brought an action against Carney upon a breach of the warranty of the deed by which the land was conveyed to him by Carney, the cause of action urged being that Carney, at the time of such conveyance, had no title to the land. In April, 1891, the United States executed a patent for the land to the Northern Pacific Railroad Company.

The first question in the case was whether Carney had title to the land at the time of the conveyance to the plaintiff. In deciding that question the Court says (p. 89): "The selection of indemnity lands which was to be made under the direction of the Secretary of the Interior (13 Statutes at Large, p. 367, Sec. 3,) did not become effectual, nor did the title pass from the United States, at least until the selection was approved, or in some way sanctioned by the Secretary of the Interior, and hence so far as appears in this case, not until the issuing of the patent in April, 1891, *which evidenced such approval.*"

Here is a distinct holding that the selection itself does not, irrespective of whether it was regular and complied with all the regulations prescribed for the making of the selection, pass title, *until approval is made by the Secretary of the Interior.*

In Musser vs. McRae, 38 Minn., 408, the action was to recover for logs cut on lands in Wisconsin. The plaintiffs claim title under a conveyance from the Chicago, St. Paul & Minneapolis Railway Company of indemnity lands which were to be selected by the company, subject to the approval of the Secretary of the Interior under the Acts of Congress of June 3rd, 1856, and May 5th, 1864. (11 U. S. Stat., p. 20; 13 U. S. Stat., p. 66.)

The Court held that "as to lands in place, the title attached upon the definite location of the line of the road. As soon as that was done, the acts pointed out the lands. As to those to be taken for deficiencies, it was necessary that something more than fixing the line of the road should be done; it was necessary that there should be a selection, and an approval of such selection by the Secretary of the Interior. Until that was done, the title granted did not attach to any lands outside of the 10 section limit."

In Musser vs. McRae, 44 Minn., 343, there was a re-trial of the same case in which it was shown that a patent was issued by the United States to the railway company wherein the selection of the lands is recited.

In deciding the case the Court uses this language, (46 N. W., p. 674): "It does not appear when prior to the issuance of the patent such selection became operative or effectual by the approval of the Secretary of the Interior. Under the former decision of this court, then, it does not appear that the railway company acquired title until this patent was issued."

"The language of the opinion of this court on the former appeal is that, 'as to lands to be taken for deficiencies, it was necessary that something more than fixing the line of the road should be done. It was necessary that there should be a selection and an approval of such selection by the Secretary of

the Interior.' The same rule is recognized and adopted by the Supreme Court of the United States. And, in respect to deficiency or 'lieu' lands under the same grant, that Court in Railroad Co. vs Price Co., 133 U. S., 511, 10 Sup. Ct. Rep., 347, say: 'The approval of the Secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial but judicial. * * * Until selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose, and the indemnity lands were incapable of identification, and remained the property of the United States. The government was indeed under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned, but such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts.' Upon such selection, however, the company became entitled thereto by virtue of the land-grant acts.' In this case there is no evidence of such approval, but the patent was evidence that the company had complied with the conditions of the grant, and was entitled to the lands selected, and obviated the necessity of any other evidence of its right to the lands. 133 U. S., 510."

The Court adopted the decision in Railroad Co. vs. Price Co., 133 U. S.. 511, as conclusive that the railroad company gets no title to indemnity lands by the selection of them unless and until such selection is approved by the Secretary of the Interior.

In Elling vs. Thexton, 16, Pac., 931, an action in the nature of an action in ejectment was brought to recover land, claiming title under a warranty deed from the Northern Pacific Railroad Company. The land was indemnity land which had been selected by the railroad company, by filing a list in the

United States Land Office at Bozeman, March 20, 1885, in the same manner in which the Northern Pacific Railroad Company filed the lists in question in this case. The lists were certified in the same manner by the Register and Receiver of the Land Office, in which it was stated that the filing of such list was allowed and approved by the Register and Receiver.

The selections had not been approved by the Secretary of the Interior.

The selection was claimed by the Railroad Company to have been made under the order of Secretary Teller, of May 28, 1883, under which it is claimed in this case that the lists in question were filed by the Railroad Company.

In deciding that the plaintiff did not have title to the land, the Court say (p. 936): "Before the railroad company, or those holding under it, can come and ask possession of a tract of land, they must be able to deraign a title and it is upon it to show that the selection was made of the particular tract of land in controversy for a loss which it had sustained; that *in the adjustment of losses in the land office at Washington* this particular tract had been allowed as 'lieu' land, so as to give it a title. This they have not done. They have but shown a simple preliminary step towards a title; but for the want of the approval of the Secretary of the Interior, or of a showing by some authority that the land selected was in lieu of some particular land lost, they have not shown any title."

In Jackson vs. La Moure County, 46 N. W., 449, (N. Dakota), the suit was brought to enjoin tax proceedings against lands within the indemnity limits of the Northern Pacific Railroad Company. A selection of the lands had not been made by the company, but the Court makes a careful examination of what was necessary to be done in order to vest the title

in such lands in the railroad company, citing the case of Wisconsin Central Railroad Company vs. Price County. The opinion of Justice Corliss, in which all the Court concur, uses this language (p. 449): "Even selection by the company, without the approval of the Secretary of the Interior, would not have divested the government of its title to the land. It was so held in the case cited. The company in that case had, in fact, made selection of the lands sought to be taxed, but the secretary had refused to approve the selection, insisting that the company was not entitled to such lands, claiming that it had already secured more than it could rightfully hold under the grant. The secretary was in error. The company was in fact entitled to as much indemnity lands as it had selected. But the Supreme Court held that, as the secretary had refused to approve the selection, no title whatever had passed, and the lands were not therefore taxable, nothwithstanding the fact that the secretary's refusal was unjustifiable. The soundness of this decision cannot be assailed. There is a well-defined difference between 'indemnity' lands and 'place' lands. The latter become instantly fixed by the adoption of the line of the road. * * * But the indemnity lands cannot be ascertained by the mere location of the road. They are substitutes for granted lands lost, and it is therefore important that the fact of such loss from the attaching superior preemption or other rights to any portion of the 'place' lands should be ascertained by the Interior Department before allowing the company to make selection for indemnity; and it is also necessary for that department to determine whether the lands which the company desires to select for indemnity are open to selection; whether there is not some prior claim upon them in behalf of settlers or others. It is therefore entirely proper that the Secretary of the Interior should have the right to approve or disapprove of the selection before it becomes final. This is clearly the meaning of the provision of the

grant to the Northern Pacific, which declares that the indemnity lands shall be selected by the company 'under the direction of the Secretary of the Interior.' (Citations). The statute must have the same construction that would be given it if the word 'aproval' had been used in place of the word 'direction.'"

Again referring to the case of Wisconsin Central Railroad Co. vs. Price County, the opinion says (p. 450): "Under this last decision the approval of the Secretary of the Interior is essential to selection. Without it there is no selection in fact. In the language of the opinion in that case, 'until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose, and the indemnity lands remained unaffected in the title.' "

The following cases make a distinction upon this subject between grants which provide for the selection of lands subject to the approval of the Secretary, and grants which provide for the selection to be made under the direction of the Secretary, viz.:

Southern Pacific R. Co. vs. Wiggs, 43 Fed., 333, 338.
Groeck vs. Southern Pac. R. Co., 102 Fed., 32.
Northern Pacific R. C. vs. Barnes, 51 N. W., 386 at 401, (N. D.)
McHenry vs. Nygaard, 74 N. W., 1106, 1108.
Sjoli vs. Dreschel, 95 N. W., 763.

It may be observed of these cases:

1st. They are in conflict with the whole line of authorities above cited.

2nd. *They are the authorities relied upon by the complainants to sustain their position that the railroad company becomes the owner of the lands without the approval of the selections by the Secretary.*

3rd. The case of Southern Pacific R. R. Co. vs. Wiggs, 43 Fed., 333, 338, does not refer to the case of Wisconsin Central Railroad Co. vs. Price County. It was decided June 23, 1890, while the Price County case was decided March 3, 1890, and the latter case may not have come to the attention of the Court.

The case is referred to and rejected as authority in the case of Grandin vs. La Bar, 57 N. W., 241, above cited

4th. The case of Groeck vs. Southern Pacific R. R. Co., 102 Fed., 32, is referred to and rejected as authority by the Supreme Court of California in the case of Southern Pacific Railroad Co. vs. Wood, 57 Pacific, 388 at 392, above cited.

The case was reversed in the Supreme Court of the United States on January 13th, 1902, 183 U. S., 690, the Court stating that the case resembled and was controlled by the case of Southern Pacific Railroad Co. vs. Bell, decided upon the same day, which latter case, cited above, states as the decision of the Court that said land remained open to homestead and pre-emption entry, and that patents issued to settlers within such indemnity limits, based upon entries made prior to the selection by the railroad company, *approved by the Interior Department,* were valid, as conveyances of the land against the selection by the railroad company.

Whether it was or was not necessary in the case of the Southern Pacific Railroad Co. vs. Bell to pass upon the question of the force of the selection which had not been approved by the Secretary of the Interior, the statement made by the

Court is in accord with every decision and expression, both of the Supreme Court and of the Land Department, that the selection by the railroad company of indemnity conveys no title to the company, unless it is approved by the Secretary of the Interior.

5th. The case of Northern Pacific R. R. Co. vs. Barnes, 51 N. W., 386, which was in the Supreme Court of North Dakota, is expressly overruled in the case of Grandin vs. La Bar, 57 N. W., 241, at 244, 247, by the Supreme Court of North Dakota, cited above, and the fact that it is overruled is referred to in the case of Southern Pacific Railroad Co. vs. Wood, 57 Pacific, at 392.

6th. The case of McHenry vs. Nygaard, 74 N. W., 1106, referred to by complainants, was decided upon a demurrer to the complaint, *which complaint stated that at the time of the definite location of the road, "all the lands in the indemnity limits were insufficient to satisfy the losses in the place limits arising from previous appropriations and dispositions."* (Page 1107.)

The point in the latter case is that *by the admission made by the demurrer* a case was presented like the case of St. Paul & Pacific Railroad vs. Northern Pacific R. Co., 139 U. S., 1, in which a like admission of fact was made by the parties. The admission of such fact affects no one but the parties to the suit, and makes the decision apply only to the case in which such admission of fact is made as a controlling fact in the case. Sjoli vs. Dreschel, 95 N. W., 763, follows the decision in McHenry vs. Nygaard.

Sage vs. Swenson, 67 N. W., p. 544, referred to by complainants, was a case in which the railroad company had ac-

quired title upon a selection of indemnity lands, which selection was at first rejected because not made in compliance with the regulations of the Secretary of the Interior, which regulations required the piece of land selected to be matched against a specific piece of land lost, and the railroad company amended its selection by complying with the regulation, *and thereupon the selection was accepted* by the Department and title was conveyed to the railroad company. Pending this action the land had been entered upon as a homestead. *The question in this case was whether the entryman had a right to acquire title to the land as a homestead during pendency of the proceedings upon the selection of the land by the railroad company.*

The Court, in deciding the case, say: "While a land grant railway company has no vested right in a mere executive withdrawal of lands for its benefit, yet the decisions of both the Interior Department and of the Federal Courts are uniform to the effect that, so long as the withdrawal continues in force, the lands are not open to settlement and entry, and no lawful settlement on them can be acquired." And the Court held that the entryman acquired no right in the land.

VII.

The purpose of the requirement that the selection of the indemnity lands shall be approved by the Secretary of the Interior.

1st. It is most clearly the purpose of the requirement of each of the land grants that no title to the indemnity lands shall be acquired by the railroad company *until the Secretary of the Interior determines that the railroad company is en-*

titled to the lands, and this is the purpose, whether the provision be that the selections are to be made subject to the approval of the Secretary of the Interior, or that the Secretary of the Interior is to cause the indemnity lands to be selected, or that the lands shall be selected under the direction of the Secretary of the Interior.

These provisions, whether in the one form or the other, are designed to protect the United States against the disposal of the publis lands as indemnity lands, in any case, except upon a decision by the Secretary of the Interior that the railroad company is entitled, under the grant, to the lands.

The Secretary is made a judge between the United States and the railroad company in every case of the railroad company's right to any of the indemnity lands.

While the railroad company acquires title to the lands within the primary limits through the grant of the statute made *in presenti* of such lands, it acquires title to lands in the indemnity limits only by the determination of the Secretary of the Interior of the lands situated within the indemnity limits which the railroad company is entitled to take in the place of lands lost in the primary limits.

Catholic Bishop of Nesqually vs. Gibbon, 158 U. S., 155 at 167.

Knight vs. U. S. Land Association, 142 U. S., 161 at 181.

Barden vs. Northern Pacific R. R. Co., 154 U. S., 288 at 325, 326, 327, 329.

Wisconsin Central R. R. Co. vs. Price County, 133 U. S., 496 at 511.

In Catholic Bishop of Nesqually vs. Gibbon, 158 U. S., 155, at page 167, the Court, by Mr. Justice Brewer, says: "It may be laid down as a general rule that in the absence of some specific provision to the contrary in respect to any particular

grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the Land Department. It falls there, unless there is express direction to the contrary."

In Knight vs. United States Land Association, 142 U. S., 161, Mr. Justice Lamar, who had been a former Secretary of the Interior, delivering the opinion of the Court, says (p. 181):

"The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of public lands."

In Barden vs. Northern Pacific Railroad Co., 154 U .S., 288, the duties of the Secretary of the Interior, as expressed in the foregoing cases in relation to the disposition of the public lands, *is applied to this very grant to the Northern Pacific Railroad Company.*

Mr. Justice Field, delivering the opinion of the Court, says (p. 325): "The grant under consideration is one of a public nature. It covers an immense domain, greater in extent than the area of some of our largest States, and it must be strictly construed. It would seem from the frequency with which we have announced this doctrine that it should be forever closed

against further question, but as the most extravagant pretensions are made in the plaintiff's construction of the present grant, we will venture to refer to one or two of the important judicial declarations on that subject."

After referring to cases, the Justice says (p. 326): "The law places under the supervision of the Interior Department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of public lands of the United States, and the adjustment of private claims to them under the legislation of Congress."

Again, on page 327, he says: "It is the established doctrine, expressed in numerous decisions of this Court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizesthe officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition or mistake, its determination is conclusive against collateral attack."

Again, on pages 328, 329, this language is used: "If the Land Department must decide what lands shall not be patented because reserved, sold, granted or otherwise appropriated, or because not free from pre-emption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting lands which were alleged to be mineral, or in refusing to patent them because the evidence was insufficient to show that they contained minerals in such quantities as to justify the issue of the patent. If, as suggested by counsel, when the Secretary of the Interior has under consideration a list of lands to be patented to the Northern Pacific Railroad Company, it is shown that part of said lands contain minerals of gold and

silver, discovered since the company's location of its road opposite thereto, he would not perform his duty, stated in *Knight* vs. *Land Association*, 142 U. S., 161, 178, as the 'supervising agent of the government to do justice to all claims and preserve the rights of the people of the United States,' by certifying the list until corrected in accordance with the discoveries made known to the department. He would not otherwise discharge the trust reposed in him in the administration of the law respecting the public domain."

Certainly, no distinction is made in the decisions of the above cases between the different grants made by Congress for the disposition of the public lands in respect to the jurisdiction of the Secretary of the Interior to supervise the administration. *Precisely the same reason exists for the action of the Secretary of the Interior under each of the grants and his administration, and the reasons given therefor,* viz.: *the protection of the United States and the prevention of the disposition of the public lands in any case where the disposition would be improper.*

2nd. The claim has been made on the part of the complainants that the provisions of the third section of the grant, that the indemnity lands "shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior," dispenses with the approval of the Secretary of the Interior.

The terms of this provision, *"under the direction of the Secretary of the Interior,"* have been passed upon and their meaning explained by the Supreme Court in the following cases:

Knight vs. U. S. Land Association, 142 U. S., 161 at 177, 178.
Orchard vs. Alexander, 157 U. S., 372 at 381, 382.

Stoneroad vs. Stoneroad, 158 U. S., 240 at 248, 249.
Warner Valley Stock Co. vs. Smith, 165 U. S., 28 at 34.

In Knight vs. United States Land Association, 142 U. S., 161, at page 177, the Court say: "Sec. 453 provides: 'The Commissioner of the General Land Office shall perform, *under the direction of the Secretary of the Interior,* all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all (*agents*) (grants) of land under the authority of the government.' Sec. 2478 provides: 'The Commissioner of the General Land Office, *under the direction of the Secretary of the Interior,* is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title (The Public Lands) not otherwise specially provided for.' "

"The phrase, 'under the direction of the Secretary of the Interior,' as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, *the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States.*"

In Orchard vs. Alexander, 157 U. S., at pages 381, 382, in Stoneroad vs. Stoneroad, 158 U. S., at pages 248, 249, and in Warner Valley Stock Co. vs. Smith 165 U. S., at page 34, the same statement of the meaning of the terms "under the direction of the Secretary of the Interior" is repeated.

3rd. The means adopted by the Secretary of the Interior for the determination by him of the indemnity lands to which the railroad company is entitled under its grant are the same in all grants which provide for indemnity lands.

These means are provided for by the regulations of the Secretary of the Interior, and these regulations are designed for his aid in making his determination, and are, in substance, that a selection of the lands be made by the railroad company, and that such selections be submitted to the Secretary of the Interior by filing the selections in the Land Department, together with certain information accompanying the selections, showing the facts that entitle the railroad company to the lands.

The Secretary is authorized to make regulations which are appropriate to secure the convenient and proper administration of the grant in the selection of the indemnity lands, and to require that the regulations be complied with, *and it is for him to determine the question of fact whether the railroad company does in any case comply with the regulations.*

Revised Statutes, Sec. 2478, and Secs. 441, 453.
Knight vs. United States Land Association, 142 U. S., 161 at 178.
Kern Oil Co. vs. Clark, 31 L. D., 200 at 206, 260.

In Knight vs. United States Land Association, 142 U. S., at page 178, speaking of the mode in which the supervision of the Secretary of the Interior may be exercised, the Court say: "The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt."

The revised statutes, Sec. 2478, provides that, "The Commissioner of the General and Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for."

4th. The Court takes judicial notice of the regulations of the Land Department.

> Cairo vs. United States, 123 U. S., [illegible] at [illegible], [illegible], [illegible].
> Wilkins vs. United States, [illegible] Fed., [illegible], [illegible].
> United States vs. Barnhart, [illegible] Fed., [illegible] at [illegible], [illegible].

The regulations are stated in Point II. of this brief, page 11 & 16.

VIII.

There has been no approval of the selection of these lands by the Secretary of the Interior.

1st. The bill of complaint shows that the selection of the lands in question has not been approved by the Secretary of the Interior. There is not only no averment of his approval,

but the statements of the bill show affirmatively that the selections had not been approved by him.

It appears from the bill (Rec. p. 5,) that the selections were made between October 16th and November 10th, 1883, by filing the list of indemnity selections alone in the land office at Duluth, and payment to the land officers of that district the fees required by law, "and said officers certified under dates of October 17th and November 9th, 1883, that said selection lists were accepted and approved," and that the lands were public lands.

The approval here referred to by the bill was the approval of the local land officers at Duluth.

The bill then states (Rec. p. 6,) *"that thereafter, on the 17th of October,* and the 9th of November, 1883, and on the 10th of October, 1887,*complying with instructions of the Secretary of the Interior, the railroad company filed in the Land Office certain lists whereby the company specified an equal quantity of lands lost from the primary or place limits equal in area to those lands described in the said selection lists before mentioned."*

"Thereafter, on June 19th, 1891, and on April 11th, 1893, *for the purpose of complying with certain other and further directions and requirements of the Secretary of the Interior, issued subsequent to the original dates of selection before mentioned, and complying with the subsequent instructions of the Secretary of the Interior,* the railroad company filed, in the United States Land Office at Duluth, certain re-arranged lists whereby the railroad company designated the particular losses of lands within the primary or place limits in lieu of which it selected each tract of land described in the several indemnity selection lists before mentioned, and particularly each tract of the lands in said Exhibit A."

The bill further states that said selection lists filed as aforesaid, and said lists of losses before mentioned, were duly trans-

mitted to the Commissioner of the General Land Office, and the same are a part of the files of said office, *"but that no action has ever been taken upon said lists or upon the selection of said lands mentioned in said Exhibit A, aforesaid, except as hereinbefore and hereinafter set forth."*

No further statement upon the subject is thereafter set forth in the bill.

From these facts stated in the bill it appears conclusively that the Secretary of the Interior has not approved the selections.

If the approval of the local land officers was the approval of the Secretary of the Interior, as contended by the complainants, why were instructions thereafter twice issued, by the Secretary of the Interior, for additional statements to be made by the railroad company in relation to these same selections, and why did the railroad company, after such instructions were given, file other and additional lists relating to these selections?

Certainly, it was because the Secretary *required the additional instructions to be complied with before he would approve the selections.* He had not lost jurisdiction to make this requirement. He does not lose jurisdiction over the subject until patent has been actually issued conveying title to the land.

Moore vs. Robbins, 96 U. S., 530 at 532, 533.
Steel vs. Smelting Co., 106 U. S., 447 at 450, 451.
United States vs. Schurz, 102 U. S., 378 at 395, 396.
Barden vs. Northern Pac. R. R. Co., 154 U. S., 288 at 327, 330.
Michigan Land and Lumber Co. vs. Rust, 168 U. S., 589 at 593.

2nd. The complainants' *evidence* shows no approval of the selections by the Secretary. The copies of the list from the files of the Commissioner of the General Land Office put in evidence by the complainants, which have been already referred to, show no action has been taken upon the selections by the Commissioner or the Secretary.

3rd. The Supreme Court expressly declares that the approval of the Secretary cannot be inferred from his not formally rejecting the selections.

Wisconsin Cent. R. R. Co. vs. Price County, 133 U. S., 496 at 511.

4th. The order of Secretary Teller, of May 28th, 1883, expressly provides for action by the Commissioner of the General Land Office upon those lists before their approval. The order says: "In order to facilitate the work of making selections, I think you should instruct the local officers that, when clear lists of selections, free from conflict or other objection, are filed with the district officers and approved by them, said selections should at once be marked upon their books and *forwarded for final examination, leaving the ascertainment of the lands lost in place to your (the Commissioner's) office,* instead of requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract, from the company as heretofore."

12 L. D., p. 196.

The filing the lists under this order without any action in relation to them by the Commissioner of the Land Office or Secretary of the Interior, certainly did not vest in the railroad company any title to the lands. *The order itself requires the action of the Commissioner upon the lists.*

In Northern Pacific Railroad Co. vs. Miller, (7 L. D., 100,) Secretary Vilas, referring to this order of Secretary Teller, of May 28th, 1883, says (pp. 123. 124): "And, first, I think it should be observed that a mere claim of selection, not based upon such foundation as the law and the regulations of the department require, cannot give a right; the selection must be one which is both well founded in the necessity for it, and the manner of making it, and, therefore, one within the direction and approval of the Secretary of the Interior. In this case, the original selection list gave no indication of the basis upon which a right selection of this tract could be claimed. It proceeded upon the assumption that the company might 'select' as many lands as it saw fit, and make proof of its losses afterwards. This practice, was, indeed, permitted for some time in the General Land Office, and thus it has happened that some railroad companies have selected, in lieu of lost lands, and procured certification of lands much in excess in acreage of their losses for which their selections were admissible. *It was also specially allowed in the case of this company. But it was so allowed only upon condition that the basis was subsequently to be supplied, and no selection was valid until approved, after such basis should be determined. It was thus only a question of the order of procedure.*"

It thus appears, both by the terms of the order, *and the construction put upon the order by the Secretary of the Interior,* that the selection lists were not valid until the list of lands lost in the primary limits had been decided upon and determined by the Commissioner of the General Land Office as the basis for lands selected in the indemnity limits, and had been approved.

Until such basis was so determined no approval of the selection lists could be made.

The statements of the bill of complaint, and the evidence, show that no basis of lands lost in the place limits to sustain these selection lists *has ever been determined by the Land Department.*

5th. The evidence conclusively shows that the lists after having been rejected have been reinstated by order of the Commissioner of the Land Office and are awaiting the action of the Commissioner, and that it is now the purpose of the Department *to consider the lists for their approval or disapproval.*

The orders of July 12th, 1900, made by the Commissioner restoring the lists say, "the selections will now be duly considered upon their legality otherwise, and in connection with any conflicting claims or rights."

(Exhibits 31 and 32, pp. 431 and 432, and Exhibit 45, pp. 491 and 492.

IX.

The railroad company did not comply with the requirements of the Secretary of the Interior in making selections of the lands, so as to be entitled to his approval.

These requirements included the following proceedings on the part of the railroad company:

1st. The list filed must specify the particular deficiencies to supply which the selections are made. Each selection must be for a particular description of land lost in the place limits, tract for tract, in quantities not exceeding one section, *and*

the affidavit of the selecting agent attached to the list of selections must state that the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner. The selections must be made from vacant unappropriated lands within proper sections and limits *nearest the granted selections in which the loss occurred.*

The Public Domain, p. 892.
10 Copp's Land Owner, p. 154.
Circular of the Secretary of the Interior, Aug. 4, 1885, 4 L. D., 90.
Atlantic & Pac. R. R. Co., 8 L. D., 373.
Northern Pac. R. R. Co. vs. Miller, 7 L. D., 100, 124, (Aug. 2, 1888.)
Iowa R. Co., 9 L. D., 370, 375, (1889.)
Florida Central & Peninsular R. Co., 15 L. D., 529, 530, 531, (Nov. 26, 1892.)
Northern Pac. R. Co., 17 L. D., 404, 405.
Atlantic & Pacific R. Co., 17 L. D., 313, 314.
Southern Pac. R. Co. vs. McKinley, 22 L. D., 493, 495, (April 24th, 1896.)
Northern Pac. R. Co. vs. Drew, 23 L. D., 380.
Northern Pac. R. Co. vs. John O. Miller, 11 L. D., 1, 2, (July 1, 1890.)
Northern Pac. R. Co. vs. John O. Miller, 11 L. D., 428, (Nov. 13, 1890.)
Hoeft vs. St. Paul & Duluth R. Co., 15 L. D., 101, 102, 103, (July 25, 1892.)
La Bar vs. Northern Pac. R. R. Co., 17 L. D., 406 at 410.
Northern Pacific R. R. Co., 20 L. D., 187 at 189.
Wisconsin R. Co. vs. Forsythe, 159 U. S., 46 at 60.
Wood vs. Railroad Co., 104 U. S., 329 at 331.

The regulations made by the Secretary of the Interior require proof by affidavit of facts which were material and of which it was the duty of the Land Department to be informed

in some manner before approval of the selections should be made.

2nd. THE SECRETARY HAD A RIGHT TO REQUIRE THE RAILROAD COMPANY TO FURNISH SUCH PROOF. HE DID REQUIRE IT TO BE FURNISHED HIM BY THE RAILROAD COMPANY.

As before stated the order of August 4th, 1885, (4 L. D., 90,) requires that the selecting agent applying to make indemnity selections, must state "in his affidavit attached to the list presented that the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner. Where deficiencies exist, for which indemnity is allowed by law, the lieu selections must be made from vacant unappropriated land within proper sections and limits *nearest* the granted sections in which the loss occurred."

The order by its own terms is made to be applied to indemnity selections which had theretofore been filed.

By the explicit directions of the Secretary of the Interior, made October 14th, 1893, in the case of La Bar vs. Northern Pacific Railroad Co., (17 L. D., 406, at p. 410,) the railroad companies having pending indemnity selections were called upon to revise their lists, showing a proper basis, "for each and all lands now claimed as indemnity, the same to be arranged tract for tract in accordance with departmental requirements. * * * * *The requirements of the order of August* 4th, 1885, *should also be enforced, and the companies should be required to specify a basis, not only for the selections now pending, but for all selections heretofore approved on account of which no previous loss has been assigned.* This is as necessary to the protection of the interests of the United States, and as an aid in the adjustment of the grants, as the requirement of a specification of losses for pending selections,

for without such designation on account of approved selections, it cannot be ascertained whether a particular loss now assigned has not already been fully satisfied by previous approvals."

3rd. The requirement was not complied with that the affidavit of the selecting agent attached to the list of selections must state that the specific losses for which indemnity is claimed are truly set forth and described in said list and that said losses have not heretofore been indemnified.

The bill of complaint states (Rec. p. 5,) that between the 16th of October, 1883, and the 10th of November of said year, the Northern Pacific Railroad Company selected all the lands described in Exhibit A of the bill of complaint by filing in the United States District Land Office at Duluth, Minnesota, its certain selections and thereby selected all of said lands as indemnity in lieu of other lands excepted from its grant. "The said selected lists are four in number and were numbered respectively 10, 15A-15B-and 16, the first of the aforesaid lists relating to lands within the first indemnity limits and bearing date October 17, 1883, the others relating to lands within the second indemnity limits, and bearing date October 17th, 1883, or some other date or dates to your orator unknown."

The following facts appear in respect to these lists:

List 10, which includes only a portion of the lands, less than half, described in said Exhibit A, is complainants' Exhibit 19, appearing in the Record at pages 325 to 332. It was filed October 17th, 1883, and is only a list of selections of indemnity lands in the first indemnity limits.

No reference is made to lands lost for which the selections were made.

Complainants' Exhibit 20, dated October 10th, 1887, appearing on pages 332 to 346, is composed of said List 10, and a list of the lands lost for which the selections in List 10 were made—but without arranging or designating the lands lost and selections made therefor, tract for tract. To this repetition of List 10 is appended the affidavit of Chas. B. Lambron of date October 7th, 1887, (p. 345), in which, after referring to the list of selections as having been heretofore selected by him he says, "that the specific losses for which the indemnity is claimed are truly set forth and described in this list, and that said losses have not heretofore been indemnified in any manner." *This affidavit it will be noted refers only to the lands selected by List* 10, *and to the losses for which those selections were made, as they appear in said Exhibit* 20.

Complainants' Exhibit 21 (Rec. pp. 346 to 367), dated July 19th, 1891, is composed of the selections contained in List 10 and of losses for which those selections were made arranged tract for tract. This list does not have attached to it the affidavit of the selecting agent that the specific losses for which the indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner.

The requirement of the Secretary's order is that a list be filed showing lands lost and the lands selected in the place of lands lost arranged tract for tract, for the use of the Secretary and Land Department in determining the company's rights to the particular selections and it was to this list that the affidavit was required to be attached.

The lands selected in said List 10, arranged tract for tract with the lands lost, appear only in said Exhibit 21, *and to this list no such affidavit is attached.*

List No. 15, dated Oct. 18th, 1883, is complainants' Exhibit 22 (Rec. pp. 368 to 378), and is a list of selections and list of lands lost for which the selections were made but not arranged

showing lands lost and selections made, tract for tract. *There is no affidavit attached to the list made by the selecting agent or other person that "the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified."*

List 15B, dated April 11, 1893, is complainants' Exhibit No. 23, appearing in the Record at pages 379 to 405, and is a repetition of List 15, rearranged, showing the lands selected and the lands lost for which the selections are made, tract for tract. *There is no affidavit of the selecting agent attached to this list stating that the specific losses for which the indemnity is claimed are truly set forth and described, and that said losses have not heretofore been indemnified.*

List No. 16 is dated October 16th, 1883, which is complainants' Exhibit No. 24, appearing on pages 406 to 409 of the Record, and is a list of selections, and a list of lands lost, not arranged so as to show the losses for which the selections are made, tract for tract. To this list no such affidavit of the selecting agent is attached.

Second List No. 16, dated April 11th, 1893, which is complainants' Exhibit No. 25, appearing on the Record at pages 411 to 417, is a list of lands selected and a list of lands lost for which the selections are made, arranged tract for tract, *but to this list no such affidavit of the selecting agent is attached.*

It thus appears that the affidavit required by the Secretary of the Interior to be attached to the lists before his approval was not furnished by the Northern Pacific Railroad Company, as requested.

It is not an answer to say that the testimony of the complainants' witness Marvin, taken in this case, shows that losses have not been before indemnified for which the selections were made.

The Secretary had a right *to have the evidence produced before him,* which the regulations called for, in order that he might act upon the evidence.

If the railroad company might disregard this regulation it might disregard any and all regulations made by the Secretary for the selections of indemnity lands, file selections, and then come into Court, as it now does, and claim it is entitled to the lands upon evidence shown to the Court, but never produced to the Secretary; in this manner taking from the Secretary of the Interior the administration of the grant, and his determination whether the selections should be approved or not, and transferring the jurisdiction to the Court.

4th. IT IS NOT CLAIMED THAT THE LANDS SELECTED WERE NEAREST TO THE LANDS LOST.

The complainants contend that at the time the selections were made the regulations did not require that the lands selected should be nearest to the lands lost, and that such requirement is not authorized by the terms of the grant, because by the terms of the grant the indemnity lands were to be *selected* by the railroad company.

The complainants call this a belated regulation.

The fact is the regulation goes back to a time preceding the original selection of these lands by the railroad company.

On July 11th, 1883, *prior to any selection of the lands in controversy in this cause by the railroad company,* the Secretary of the Interior added to his order of May 28th, 1883, under which the complainants claim the selections were made, the further regulations and instructions to the Commissioner of the General Land Office, as follows:

"I call your attention to my letters of May 17 and 28 last, *relating to the Northern Pacific land grant, and particularly to the indemnity part of such grant.* * * * Under the authority conferred and in discharge of the duty imposed upon me by the Act, which provides that the selections shall be made under the direction of the Secretary of the Interior, I deem it best to indicate at the outset what, in my opinion, the practice should be in relation to selections. The amount of lands lost within each of the states named should be made up by selections within such State, without regard to quality, if there be sufficient within the indemnity limits for that purpose. *I do not think it was the intention of the granting Act, nor do I deem it just or equitable to the government or to the settlers, to permit the company to cull the lands within such limits, leaving portions unselected because they are poor, and then selecting other lands farther along* the line, in place of lands lost within the granted limits of those states."

The Public Domain, p. 892.

10 Copp's Land Owner, p. 154.

This instruction and regulation is made specially in reference to the Northern Pacific Railroad grant.

It thus distinctly appears that in October and November, 1883, when the railroad company first made the selections, direct and specific instructions had been given by the Secretary of the Interior, making it necessary that the lands should be selected in the indemnity limits nearest to the lands lost for which the selections were made, and forbidding *the company to cull the lands within such limits, leaving portions unselected because they were poor.*

This is followed by the circular of Secretary Lamar, of August 4th, 1885, *applying to all railroad indemnity land grants*, directing the Commissioner of the Land Office that, "Where deficiencies exist, for which indemnity is allowed by law, the lieu selections must be made from vacant unappropriated land within proper sections and limits *nearest* the granted sections in which the loss occurred. You will be careful to see that this rule is strictly complied with, *and will reject all selections not made in conformity thereto.*"

(4 L. D., 90.)

The terms of the grant to the Atlantic & Pacific Railroad, (14 U. S. Stat., pp. 294, 295), the terms of the grant to the Southern Pacific Railroad, (14 U. S. Stat., p. 289, 295,) the terms of the grant to the Texas Pacific Railroad, (16 U. S. Stat., p. 576,) and the terms of the grant to the State of California, to aid the construction of railroads, (14 U. S. Stat., p. 548,) are the same as the terms of the grant to the Northern Pacific Railroad upon this subject.

In the case of the Atlantic & Pacific Railroad Company, (6 L. D., p. 373, decided March 29th, 1888,) the Commissioner of the General Land Office rejected a list of indemnity selections containing 163,381.62 acres, made by the railroad company, on the ground that the lands selected "*are not nearest to the lost lands, as required by departmental instructions.*"

(Circular, 4 L. D., 98.)

This decision of the Commissioner of the General Land Office was approved by the decision of the Secretary of the Interior.

That decision covers the case at bar and is applicable to the four railroad land grants above mentioned. It is clearly applicable to the grant to the Northern Pacific Railroad Company, because the latter grant is in the same terms.

The same decision has been made in reference to the Northern Pacific Railroad Company.

In Northern Pacific Railroad Company, (17 L. D., 494,) decided by the Secretary October 14th, 1893, on appeal from the decision of the Commissioner of the Land Office, of June 17th, 1892, which was before the last list filed by the railroad company relating to the limits in question, the Secretary said (p. 495): "It is a well settled principle running through all the legislation pertaining to land grants to aid in the construction of railroads, that indemnity limits must be taken nearer to the last limits, so that the portion of the country benefitted by the building of the road may bear the burden of the grant made to aid in its construction. The co-terminus principle applied to nearly all the grants, was evidently intended to accomplish this result. Were it otherwise, the company might thus pass over the last limits within the limits of its grant and pick out the best lands, which it has evidently done in the present case, if the law cannot can be satisfied within the limits of its grant in the State of Idaho."

In Northern Pacific Railroad Company, (20 L. D., 185,) the Secretary of the Interior again held, March 10, 1895, "that indemnity selections made by that company must be of lands subject thereto nearer to the limits [sic]."

On this point he says (p. 189): "It has for years, however, been the doctrine of this department that in all kinds of rail-

road grants, providing for indemnity, the selections must be of lands subject thereto nearest the lands lost."

"In general circular of instructions, relative to railroad indemnity selections, approved by Secretary Lamar, August 4, 1885, (4 L. D., 90,) it was said, among other things: "When deficiencies exist, for which indemnity is allowed by law, the lieu selections must be made from vacant unappropriated land, within proper sections and limits, nearest the granted sections in which the loss occurred. *These instructions applied to the Northern Pacific in common with other roads.* This rule was adhered to by Secretary Noble in the case of the Atlantic & Pacific Railroad Company, decided March 29th, 1889, (8 L. D., 373.) That company has a grant very similar in its provisions to the grant to the Northern Pacific Company. See also case of Chicago, St. Paul, Minneapolis and Omaha Company, 10 L. D., 147."

The Secretary then cites and quotes from the case of Wood vs. Railroad Company, 104 U. S., 329, (which is quoted below.) and adds (p. 100): "On principle and by analogy, the doctrine of that case is applicable to this and should govern."

In Wisconsin Central Railroad Co. vs. Forsythe, 159 U. S., 46, at page 60, the Court says: "So far as railroads are concerned, it is the thought not merely that the general welfare will be subserved by the construction of the road along the lines indicated, but, further, that such grant shall not be attended with any pecuniary loss to the United States; for the universal rule is to double the price of even sections within the granted limits. The expectation is that the company receiving the odd sections will take pains to dispose of them to settlers, and thus by their settlement and improvement increase the value of the even sections adjoining, and so justify the

added price. To fully realize this expected benefit it is essential *that the lands taken by the company shall be as near to the line of the road as possible; and so, while selection of remote lands is permitted, it is only when and because there is a necessity of such selection to make good the amount of the grant. Obviously, therefore, an Act must be construed to realize, so far as possible, this intent and to accomplish the desired result."*

In Wood vs. Railroad Company, 104 U. S., p. 329, the grant was made to the Burlington & Missouri River Railroad Company "of every alternate section of public land (excepting mineral lands, as provided in this Act,) designated by odd numbers, to the amount of ten alternate sections per mile on each side of the road, on the line thereof, and not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road was definitely fixed."

13 U. S. Stat., p. 364, Sec. 19.

The Court say (p. 331): "Although there was no express limitation of the distance from the road in which the land was to be selected, it was necessarily implied that the selection should be made of alternate sections nearest the road, of which the land had not been previously sold, reserved or otherwise disposed of. The company was not at liberty to pass beyond land open to its appropriation and take lands farther removed from its road. *In all grants which are to be satisfied out of sections along a line of a road, it is necessarily implied, in the absence of specific designation otherwise, that the land is to be taken from the nearest undisposed sections of the character mentioned.* Such grants give no license to the grantees to

roam over the whole public domain lying on either side of the road, in search of land desired. The grants must be satisfied out of the first land found which meets the conditions named."

5th. THE COMPLAINANTS CONTEND THAT BECAUSE THE TERMS OF THE ACT PROVIDED THAT THE LANDS WERE TO BE "SELECTED" THE COMPANY HAS A RIGHT OF CHOICE, AND THEREFORE SUCH CHOICE MAY BE EXERCISED THROUGH THE ENTIRE LIMITS ALLOWED FOR THE INDEMNITY LANDS.

The term "select," as applied to indemnity lands, *is used in every one of the grants for railroad companies in which indemnity lands are provided for.* In those grants where the selection is required to be made of lands nearest the sections granted, or nearest the line of the road, or most contiguous to the line of the road, the statute says they are *to be selected.*

In the grant of lands to the State of Kansas, (14 U. S. Stat., p. 236, Sec. 1,) the provision is: "It shall be the duty of the Secretary of the Interior to cause to be *selected,* for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified."

In the grant to the California & Oregon Railroad Company, and other companies, (14 U. S. Stat., p. 239, Sec. 2,) the provision is: "Other lands designated as aforesaid, shall be *selected* by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections."

In the grant to the State of Kansas, for the benefit of the Union Pacific Railroad Company, (14 U. S. Stat., p. 289, Sec. 1,) the provision is: "Then it shall be the duty of the Secretary of the Interior to cause to be *selected,* for the purposes aforesaid, from the public lands of the United States, nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved or otherwise appropriated."

In the grant to the State of Florida, (11 U. S. Stat., p. 15, Sec. 1,) the provision is: "Then it shall be lawful for any agent or agents to be appointed by the Governor of said State, to *select,* subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified."

In the grant to the State of Iowa, (11 U. S. Stat., p. 9, Sec. 1,) the provision is: "Then it shall be lawful for any agent or agents, to be appointed by the Governor of said State, to *select,* subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified."

The same language is used in the terms of the grant to the State of Louisiana, (11 U. S. Stat., pp. 18, 19, Sec. 1,) in the grant to the State of Michigan, (11 U. S. Stat., p. 21, Sec. 1,) in the grant to the State of Minnesota, (11 U. S. Stat., p. 195, Sec. 1,) in the grant to the State of Alabama, (11 U. S. Stat., p. 17, Sec. 1,) in the grant to the State of Mississippi, (11 U. S. Stat., pp. 30, 31, Sec. 1,) and to the State of Wisconsin, (11 U. S. Stat., p. 20, Sec. 1.)

It is thus made very clear that the term "selection" has no other or different signification, as employed in the grant to the Northern Pacific Railroad Company, than it has in the grants

above referred to. What is meant by the term "selection" is the same in each of the grants.

According to the contention and argument of the complainants the term "selection" or "select" would be a term misused and misapplied in all of the above grants, simply because the requirement of the grant was that in selecting the lands those nearest to the lands lost or to the tiers of lands granted alone were to be taken.

In neither of the grants is the term inappropriate. If there are more lands within the indemnity limits than are required to supply the losses, and two or more parcels are situated at an equal distance from the parcel lost, or from the tiers of the lands granted, selection may be made in such case between those different parcels. But the term "select" used by the grant, is evidently used in the sense of designate. In any event the indemnity lands must be designated, and when designated, the condition of the lands as to their location, and as to whether they are subject to be taken under the grant, is to be determined. The term "select" is a proper term to be used. It covers the case where there is only to be a designation made, and, also, the case where a choice may be made between different parcels of land, the designation of either of which would be proper.

6th. It is undisputed in this case that the company disregarded the direction to make the selection of the indemnity lands nearest the lands lost. No claim is made that it was complied with. The complainants contend that the direction may be disregarded.

THE QUESTION HERE IS WHETHER THE SECRETARY HAD THE RIGHT TO WITHHOLD HIS APPROVAL OF THE SELECTIONS WHICH WERE MADE IN DISREGARD OF THE REGULATION.

It has been the practice of the Land Department throughout its administration of the railroad land grants, to refuse approval where selections have been made without compliance with the regulations prescribed by the Secretary of the Interior.

Northern Pacific R. R. Co. vs. Miller, 7 L. D., 100 at 123.
Iowa R. R. Co., 9 L. D., 370 at 375
Florida Cent. & Peninsular R. R. Co., 15 L. D., 529, 530.
Atlantic & Pacific R. R. Co., 17 L. D., 313, 314.
Northern Pacific R. R. Co., 17 L. D., 404 at 405, 406.
Southern Pacific R. R. Co. vs. McKinley, 22 L. D., 493, 495.
Northern Pacific R. R. Co. vs. Drew, 23 L. D., 380, 381.
Northern Pacific R. R. Co. vs. John O. Miller, 11 L. D., 1, 2.
Northern Pacific R. R. Co. vs. John O. Miller, 11 L. D., 428, 429.
Hoeft vs. St. Paul & Duluth R. R. Co., 15 L. D., 101, 103.

Our position is not that the Secretary of the Interior can not himself investigate the facts and ascertain whether the lands have been selected nearest to the lands lost for which the selections are made, and if he so finds then approve the selections. Our position is that until such facts are found the Secretary can not approve; that such facts are neither shown by the complainants, nor are they claimed to exist; and that, therefore, the complainants are not shown to be entitled to have the selections approved.

X.

Reply to the claim of the complainants, that the selections were filed by the railroad company under the order of the Secretary of the Interior of May 28th, 1883, (12 L D., p. 196,)

and that the railroad company was not required to comply with the order of August 4th, 1885, (4 L. D., 90.)

1st. Prior to the making of the order of May 28th, 1883, the railroad company was required, in making its selections, to accompany the selections with a list of the lost lands in the place limits in lieu of which the selections were made, showing, tract for tract, lands selected for lands lost. This appears by the terms of the order itself.

12 L. D., p. 196.

It also appears in the decision of the Secretary of the Interior in the case of Minnesota Railway Extension Company, (12 L. D., p. 518,) and in La Bar vs. Northern Pacific Railroad Company, (17 L. D., pp. 408, 409.)

2nd. The order of May 28th, 1883, was made for the special purpose of opening for settlement as speedily as possible the lands within the indemnity limits, *which had been withdrawn from settlement*, and to accomplish that object, allowed the selections to be made in the first instance, without specifying the losses for which they were made, leaving the losses to be ascertained, tract for tract, to the work of the Land Department.

The expression of the order is that, "The work of adjusting the grant will go forward much more rapidly under this plan than under the former practice."

3rd. As stated above, on July 11th, 1883, prior to the filing of any of the selections in question, the Secretary of the Interior added to the order of May 28th, 1883, requiring the railroad company *to select the lands nearest to the lands within the primary limits, without culling in selecting, and leav-*

ing any lands which were subject to selection, in this manner aiding the Land Department in the adjustment of the grant, so that the lands selected in the indemnity limits would be nearest to the lands lost for which the selections were made.

The Public Domain, p. 892.
10 Copp's Land Owner, 154.

It thus appears that at the time the original selection lists were filed by the railroad company, on October 18th, 1883, the orders of May 28th, 1883, and July 11th, 1883, permitted the railroad company to file selections of indemnity lands, *which had been withdrawn from settlement, but the selections were to be made nearest to the lands lost without culling the lands selected.*

4th. The order of May 28th, 1883, did not accomplish the purpose for which it was intended, and it was revoked by the order of August 4th, 1885, which required preliminary lists to be filed by the railroad company, specifying the particular deficiencies for which indemnity is claimed, and the selections to supply the deficiencies to be made from the proper sections in the indemnity limits "nearest the granted sections in which the loss occurred," and that it should be accompanied by affidavit attached to the list that the specific losses for which indemnity is claimed are truly set forth and described in the list, and that said losses have not heretofore been indemnified in any manner.

4 L. D., p. 90.
Rec. pp. 763, 764.

This order of August 4th, 1885, is clearly by its terms made applicable to selection lists which had been already filed by any and all railroad companies.

It says in express terms: "Where indemnity selections have heretofore been made without specification of losses, you will require the companies to designate the deficiencies for which such indemnity it to be applied before further selections are allowed * * * You will be careful to see that this rule is strictly complied with, and will reject all selections not made in conformity thereto."

5th. This order of August 4th, 1885, is held by the decisions of the Secretary of the Interior *to apply to the lists of selections which had been filed by the Northern Pacific Railroad Company prior to the date of the order,* and compliance with the order in respect to such lists has been required as a condition of the approval of the lists.

Northern Pacific R. R. Co. vs. John O. Miller, 11 L. D., 1, 2
Darland vs. Northern Pacific R. R. Co., 12 L. D., 195, 196, 197.
Southern Minnesota R. Extension Co., 12 L. D., 518, 519.
La Bar vs. Northern Pacific R. R. Co., 17 L. D., 406 at 409, 410.

In Northern Pacific R. R. Co. vs. John O. Miller, 11 L. D., 1, a selection was made on January 30th, 1884, after the order of May 28, 1883, and before the order of August 4, 1885, by the Northern Pacific Railroad Company. Secretary Noble decided the case on July 1st, 1890, rejecting the selection for a failure of the railroad company to comply with the order of August 4th, 1885. He says (p.2) as follows:

"The claim of the Northern Pacific Railroad Company to a right to select the tract involved is based upon the third section of its granting Act (July 2, 1864, 13 Stats., 365), which provides that whenever, prior to the definite location of its

line of road, any of said (granted) sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted, or otherwise disposed of, other lands shall be selected in lieu thereof under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers not more than ten miles beyond the limits of said (granted) alternate sections."

"The loss to its grant in the manner prescribed of a tract or tracts of land corresponding to those which it claims as indemnity is, under the stated provisions of its grant, an essential to the right of the company to so select."

"That such losses should first be shown to the satisfaction of the land department is obvious, for otherwise the indemnity claimed therefor could not properly be selected under the 'direction of the Secretary of the Interior,' or, in other words, in accordance with the Act of 1864, *supra*.

"By circular approved August 4th, 1885, (4 L. D., 90,) the various local officers were instructed as follows:"

"Before admitting railroad indemnity selections in any case, you will require preliminary lists to be filed specifying the particular deficiencies for which indemnity is claimed *and in cases where indemnity selections have heretofore been made without specification of losses, you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed.*"

"The particular loss in lieu of which the Northern Pacific Railroad Company seeks to select the land in question is not shown by the record before me, and I am advised by your office that it has failed to designate the same."

"The said application of the Northern Pacific Railroad is accordingly denied."

In Darland vs. Northern Pacific Railroad Co., 12 L. D., 195, the Northern Pacific Railroad Co. had selected land Janu-

ary 8th, 1885, which was seven months before the order of August 4th, 1885, was made revoking the order of May 28th, 1883.

Secretary Noble, after stating that the selections were made under the instructions of the department, of May 28th, 1883, says (pp. 196, 197): "Subsequently, on August 4, 1885, instructions were issued, requiring preliminary lists to be filed, specifying the particular deficiencies for which the indemnity is claimed, but it was also provided that, where indemnity selections had theretofore been made, without specifying the particular basis, the company should be required to designate the particular deficiencies before allowing further selections (4 L. D., 90). The company complied with these instructions as to list No. 26, making said selection legal and regular in this respect."

"In the case of Northern Pacific Raliroad Co. vs. John O. Miller (on review), 11 L. D., 428, it was held that indemnity can only be selected in lieu of a section or part of section lost in place, and the basis for such selection must be specifically designated and shown to be excepted from the grant before indemnity can be allowed, and that where a selection is made without designating the basis, the invalidity of such selection may be attacked by a settler. But the selection in that case was not protected by the order of May 28, 1883, for the reason that it had never been withdrawn, and was, therefore, not of the character of lands contemplated by said order."

"The decision of your office rejecting the final proof of Darland is affirmed, but his filing should not be cancelled, but remain subject to the rights of the company, if the selection of the company should be finally certified."

In Southern Minnesota Railway Extension Co., 12 L. D., 518, the Secretary says (pp. 518, 519): "So far as my re-

search has gone, the specification of losses has always been required by the authorities of the Land Department since 1879 as preliminary to the approval of lists of indemnity land, except when Secretary Teller, on May 28, 1883, dispensed with that prerequisite in respect to the Northern Pacific Railroad alone, in the hope of thereby expediting the adjustment of that particular grant. But in authorizing this dispensation, he expressly recognized the existing rule of the department, 'requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract, from the company as heretofore.'" (12 L. R., 196.)

"Whatever may have been the practice theretofore, on August 4, 1885, by circular of the General Land Office, approved by Secretary Lamar, it was directed that such preliminary lists, specifying the particular deficiencies, should be filed in every case. And where indemnity selections had been made thertofore, without such specification of losses, the register and receiver were directed to require the companies to designate their losses, before further selections were allowed. (4 L. D., 90.)"

"Since the issue of this emphatic circular, there has been abundant opportunity for specifying the losses, on which the lists, now sent me, are based, but this the company has apparently failed to do."

"I see no sufficient reason in the present case why the company's compliance with the plain requirements of the law and the rules of the department should be waived and said lists approved; but many reasons why the law should be adhered to and the rules enforced. (Northern Pacific R. R. vs. Miller, 11 L. D., pp. 1, 428.)"

"With these views, I decline to approve the said lists, and herewith return them to you that the losses may be specified."

In La Bar vs. Northern Pacific Railroad Co., 17 L. D., 426, the order was made heretofore referred to, by the Secretary of the Interior, requiring all railroad companies having pending indemnity selections to revise their lists within six months, so that a proper basis will be shown for each and all the lands claimed as indemnity, arranged tract for tract, in accordance with the departmental requirement, *and directing that the order of August 4th, 1885, should be enforced.*

The Secretary gives the reasons for the order which he makes. He says (pp. 428, 429): "To a proper adjustment of these grants it is necessary to ascertain on account of what lands lost to the grant these pending selections are claimed, and all lands not properly claimed should no longer be reserved on account of such grants."

"Prior to the year 1879, it seems to have been the practice, due to the peculiar rulings in the matter of railroad grants then prevailing, to allow the selection of indemnity lands without a specification of the losses on account of which such selections were claimed."

"Since the circular of November 5, 1879, however, it has been uniformly required that the losses be specified, except in the case of the Northern Pacific grant, which was excepted from such requirement by departmental order of May 28, 1883, (12 L. D., 536,) under the belief that such course would aid a speedy adjustment and secure an early restoration of those lands not needed."

"It failed to accomplish that result and by the circular of August 4, 1885, (4 L. D., 90,) it was directed that no further selections be allowed by any railroad company until losses had been specified for all previous selections. I know that under these several orders selections have been made, in some instances without specifying a basis, and again with the losses indiscriminately assigned without regard to the selected tracts, otherwise than that in the aggregate the area agreed."

"In the case of the Northern Pacific R. R. Co. vs. John D. Miller (on review, 11 L. D., 548) it was held that the basis for an indemnity selection must be specifically designated, and the rights of settlers can only be ascertained and protected by the enforcement of such a rule. Since said decision it has been repeatedly ruled that the losses must be specifically designated."

"In the case of the Florida Central and Peninsular R. R. Co. (15 L. D., 549) the several decisions of this department in the matter of the selection of indemnity lands under railroad land grants were reviewed, and it was held that such loss must be specified and the selection made on account thereof designated, in no place exceeding a section, the difference in area approximating the smallest legal subdivision."

"In this way such selection stands by itself, and in the event of the failure of the basis in any instance, the selection dependent thereon is readily ascertainable. * * * When indemnity lists are submitted for the approval of this department, it is required that the losses be specifically designated in the class lists submitted as the basis of patents to be issued to the companies."

"[illegible] offers to recommend the lists so as to meet the requirements where such duty had not been performed by the companies."

"This only tends to complicate the matter, as it shows in the [illegible] question. From the lists embracing the land in question, a class has been prepared by [illegible] approved March 30, 1899, and [illegible]."

"Part of the selected tracts have been patented and part of the basis assigned in the list approved; many selections have been cancelled, and it would require much time to account this list so as to ascertain which of the selections are now pending, and in what basis they stand."

"It would seem that there is necessity for some positive action in the premises. Aside from the legal aspect of the case and the protection of the rights of adverse claimants, it will greatly facilitate the work of the adjustment of these grants, to exact compliance with the regulations heretofore prescribed in the matter of the selection of indemnity lands."

"*I have, therefore, to direct that you call upon all railroad companies having pending indemnity selections to revise their lists within six months from the date of your order,* so that a proper basis will be shown for each and all lands now claimed as indemnity, the same to be arranged tract for tract in accordance with departmental requirements, and that all tracts formerly claimed for which a particular basis has not been assigned in the manner prescribed, at the expiration of said six months, be disposed of under the terms of the orders restoring indemnity lands without regard to such previous claim."

"*The requirements of the order of August 4, 1885, should also be enforced, and the companies should be required to specify a basis not only for the selections now pending, but for all selections heretofore approved on account of which no previous loss has been assigned.*"

"This is as necessary to the protection of the interests of the United States, and as an aid in the adjustment of the grants, as the requirement of a specification of losses for pending selections, for without such designation on account of approved selections, it cannot be ascertained whether a particular loss now assigned has not already been fully satisfied by previous approvals."

"To bind the companies they must make their own selections, which necessitates the statement of a basis on which such selections rest, and while they are to be made under the direction of the Secretary of the Interior, it is not contemplated that the work is thereby transferred and added to the duties of your office."

"The regulations in the matter of the selection of indemnity lands must therefore be strictly enforced, and if the losses assigned for previous approvals are carefully examined to the end that a good basis is shown to exist for each tract heretofore received as indemnity, and are not duplicated in the losses assigned for pending selections, the grants will practically adjust themselves."

6th. The order of May 28, 1883 did not dispense with and was not intended to dispense with the determination of the proper facts by the Secretary of the Interior before approval should be made of the selections, or with any of the requirements which are made, either by the statute or by the regulations of the Land Department, as a condition of approval.

Before any approval, the Secretary was required, as stated in the case of Wisconsin Central Railroad Co. vs. Price County, 133 U. S., at page 511, "to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions, he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for

any other purpose, and if so, what portion had been thus appropriated, and what portion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of their lands."

The regulations made by the Secretary of the Interior from time to time, specifying the acts to be done by the railroad company in making its selections, are designed to aid and facilitate the work of the Secretary of the Interior in ascertaining the facts which were necessary to be determined by him as a condition of his approval.

In Northern Pacific Railroad Company vs. Miller, 7 L. D., 100, Secretary Vilas, on August 2nd, 1888, in a very carefully prepared opinion, says upon this subject as follows (pp. 123, 124): "The selection must be one which is both well founded in the necessity for it and the manner of making it, and, therefore, one within the direction and approval of the Secretary of the Interior. In this case the original selection list gave no indication of the basis upon which a right of selection of this tract could be claimed. It proceeded upon the assumption that the company might 'select' as many lands as it saw fit, and make proof of its losses afterwards. This practice was, indeed, permitted for some time in the General Land Office, and thus it has happened that some railroad companies have selected, in lieu of lost lands, and procured certification of lands much in excess in acreage of their losses for which the selections were admissible. It was also specially allowed in the case of this company. *But it was so allowed only upon condition that the basis was subsequently to be supplied, and no selection was valid until approved after such*

basis should be determined. It was thus only a question of the order of procedure."

"This practice was of doubtful validity, at least to give a right from date of first selection, and was changed some time since, by departmental regulation. The Act is explicit that, whenever, prior to the definite location of the line, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted, or otherwise disposed of, other lands shall be selected by said company *in lieu thereof,* under the direction of the Secretary of the Interior, etc., etc."

"Manifestly it was necessary to point out the section, or the part of a section, which had thus been lost to the grant, and the manner of its loss, in order to authorize the taking of another tract of land in place of it. The department ought, before approval of a selection, first to determine whether the land lost to the grant was so previously appropriated as to furnish the basis of a selection, and it ought to be particularly shown for what specific lands lost specific selections were made. *Until these facts appear the company has not established the right to appropriate from the body of lands open to its choice, but is confined to those specifically granted."*

"In accordance with this rule, my predecessor (Mr. Lamar), on the 4th of August, 1885, approved a circular from your office to the local officers, in which they were directed as follows:

'Before admitting railroad indemnity selections in any case, you will require preliminary lists to be filed specifying the particular deficiencies for which indemnity is claimed. * * * Where indemnity selections have heretofore been made without specification of losses, you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed.'

"It was in obedience to the last clause that this company filed, on the 25th of October, 1887, the list of particular deficiencies upon which the claim of selections in list number two before mentioned was based. That list excellently illustrates the necessity for the rule mentioned. Since 1883, the claim of this company to take the 58,000 acres in list number two has remained a cloud upon all the lands embraced within it. Yet, when called upon to specify particular lands lost from the granted limits, for which such a right of selection can exist, only 4,011 acres are shown, except by claiming indemnity for about 55,000 acres of lands, for the most part not particularly defined, lying within the Yakima Indian Reservation."

7th. From the orders and decisions above referred to, the following facts appear in relation to the claim that the selections were filed under the order of May 28th, 1883, and that the railroad company was not required to comply with the order of August 4th, 1885:

First. After the order of May 28th, 1883, was made, and *prior to* the filing of any of the selections, the Secretary of the Interior, by his order of July 11, 1883, required the railroad company, in making its selections, to select the lands nearest to the lands within the primary limits, without culling in selecting, and leaving no lands which were subject to selection, so that the lands selected would be nearest the lands lost for which the selections were made, thus making it necessary, in order to comply with the order of May 28, 1883, to make the selections from the lands which lay nearest to the lands lost for which the selections were made, and without culling the lands.

This requirement was not complied with.

Second. The order of August 4th, 1885, revoked the order of May 28th, 1883, and required the railroad company to file lists specifying the particular deficiencies for which indemnity is claimed, and required the selections to supply the deficiencies to be made from proper sections in the indemnity limits nearest the granted sections in which the loss occurred, *and that it should be accompanied by affidavit*, attached to the list that the specific losses for which indemnity is claimed are truly set forth and described in the list, and that said losses have not been heretofore indemnified in any manner, and that this order of August 4th, 1885, applies to the selections which have theretofore been made by the company under said order of May 28, 1883, and that this order was not complied with by the company.

Third. There is no claim in the bill of complaint that the company acted under or complied with the order of May 28th, 1883, in filing its selections, or that it acquired any rights to the lands under said order.

The case made by the bill is that *it complied in all respects with the instructions of the Secretary of the Interior*, and under his direction made its selections between October 16th, 1883, and November 10th of said year, and thereafter, on the 17th of October and 9th of November, 1883, and the 10th of October, 1887, complying with other and further instructions of the Secretary, the company filed certain lists whereby the company specified an equal quantity of lands lost in the primary limits of said grant, equal in area to those lands described in said several selection lists heretofore mentioned, and that on June 19, 1891, and April 11, 1893, the railroad company, "insisting and maintaining that its prior selections of the lands described in said Exhibit A hereto annexed were in all respects valid and sufficient, and for the purpose of complying with cer-

tain other and further directions and requirements of the Secretary of the Interior, issued subsequent to the original dates of selection heretofore mentioned, *and complying in all respects with said subsequent instructions of the Secretary of the Interior*, filed in said United States District Land Office, at Duluth, Minnesota, certain rearranged lists wherein and whereby said railroad company designated the particular losses of lands within the primary or place limits of said grant, in lieu of which it selected each tract of land described in the several indemnity selection lists hereinbefore mentioned, and particularly each tract of lands in the aforesaid Exhibit A described."

(Rec. pp. 5 and 6, paragraph VI. and VII.)

The bill then states as follows (pp. 6 and 7): "Your orators further show that each of the tracts described in said several indemnity selection lists, and each of the tracts described in said Exhibit A, was selected by said railroad company in lieu of a tract or tracts of corresponding size situate within the primary or place limits of the original grant to said railroad company, within the State of Minnesota, which had been lost to the said railroad company by reason of having been granted, sold, reserved, occupied, pre-empted, or otherwise disposed of prior to the time when that part of the line of said road lying opposite the same had been finally fixed and located."

The bill then states (Rec. p. 8, paragraphs VIII and IX) that said selection lists and said lists of losses "were duly transmitted to the Commissioner of the General Land Office, and that the same are now parts of the files in said office, but that no action has ever been taken upon said lists or upon the selection of said lands mentioned in Exhibit A, aforesaid, except as hereinbefore and hereinafter set forth."

"And your orators further show that by *virtue of the matters hereinbefore set forth*, the said Northern Pacific Railroad Com-

pany became the owner and entitled to the possession of all the lands in the said Exhibit A hereto annexed described."

It thus distinctly appears by the bill of complaint that the only ground upon which the right of the company to the lands is placed is this, viz.: That the railroad company complied *with all the instructions of the Secretary of the Interior, in the selections of the lands*, and that each of the tracts described in said Exhibit A was selected in lieu of a tract or tracts of corresponding size situate within the primary or place limits of the original grant to said railroad company within the State of Minnesota which had been lost to the company.

The evidence does not sustain the case thus made by the bill of complaint. Compliance with all of the instructions of the Secretary of the Interior is not shown. The failure to comply is shown as above pointed out.

XI.

The court has no jurisdiction in this case to determine whether the railroad company is entitled to have the selections approved, nor to determine that there is such deficiency in the grant as to entitle the company to the lands. Neither has the court jurisdiction to determine whether the defendants are entitled to the benefits of the Act of July 1, 1898.

Whether the lands were subject to selection under the grant, and whether they were selected under the regulations of the Secretary of the Interior, and whether the entries of the lands by the defendants' grantors were such as entitled them to the benefits of the Act of July 1, 1898, are facts to be determined by the Secretary of the Interior.

The jurisdiction to make such determination is exclusively in him. They are judicial questions to be determined upon an investigation of facts to be made by him.

His decision upon questions of law which may be involved in his action is subject to review by the Courts, but this can only be done upon facts which are found by the Secretary, or upon facts which are conceded, or upon facts which are established without dispute before him.

It is only by taking the facts so determined that this Court has jurisdiction to pass upon the legal questions which have been decided by the Secretary in the exercise of his jurisdiction in the administration of the railroad grant. The Court does not have jurisdiction to determine the facts.

Where the claims of the parties are pending before the Secretary and no decision has been made by him, the Court can not act in his stead.

Where the Secretary of the Interior has made a decision and there was involved a mixed question of law and fact, and the Court cannot separate it so as to detemine what the mistake of law is, the decision of the Secretary is conclusive.

United States vs. Northern Pac. R. Co., 95 Fed., 864 at 870.
James vs. Germania Iron Co., 107 Fed., 597 at 600, 601.
Marquez vs. Frisbie, 101 U. S., 473 at 475, 476.
Steel vs. Smelting Co., 106 U. S., 447, 450, 451.
Quinby vs. Conlan, 104 U. S., 420 at 425
Barden vs. Northern Pac. R. Co., 154 U. S., 288 at 326-331.
Knight vs. U. S. Land Assn., 142 U. S., 161 at 176, 178 and 181
Smelting Co. vs. Kemp, 104 U. S., 636 at 640, 641.
Heath vs. Wallace, 138 U. S., 573 at 585
Wisconsin Central R. Co. vs. Price County, 133 U. S., 496 at 511.
United States vs. Missouri, etc., R. Co., 141 U. S., 358 at 375.
Bishop of Nesqually vs. Gibbon, 158 U. S., 155 at 166.
United States vs. California, etc., Land Co., 148 U. S., 31 at 43.
Moore vs. Robbins, 96 U. S., 530 at 535.
Mich. Land & Lumber Co. vs. Rust, 168 U. S., 589, 592.

Brown vs. Hitchcock, 173 U. S., 473 at 477.
Clark vs. Herington, 186 U. S., 206 at 210.
Cosmos Exploration Co. vs. Gray Eagle Oil Co., 112 Fed., 4, 7, 8.
Savage vs. Worsham, 104 Fed., 18.
King vs. McAndrews, 111 Fed., 860.
Bockfinger vs. Foster, 23 Sup. Ct. Reporter 836, 190 U. S., 116.
Kirwan vs. Murphy, 189 U. S., 35
Germania Iron Co. v United States, 165 U.S., 379 at 382.

In United States vs. Northern Pacific R. Co., 95 Fed., 864 at 870, the Circuit Court of Appeals says: "The rule, broadly stated, is that the land department has jurisdiction over every case in which the control and disposition of the land is intrusted to its care, and that its judgment in such a case, whether right or wrong, conveys the legal title to the patentee, and is valid, unless avoided for error, mistake or fraud. * * * * Its decision of a question of fact, however, is conclusive, even in a direct proceeding to set aside the patent, unless it is first made to appear clearly that its adjudication was caused by a plain mistake; or was induced by fraud or perjury. There is no general appeal from the officers of the land departments to the Courts; and the latter cannot review the decisions of questions of fact rendered by those officers in the absence of convincing proof that they were induced by fraud or mistake."

In James vs. Germania Iron Co., 107 Fed., 597 at 600, 601, the Circuit Court of Appeals says: "The land department of the United States is a quasi judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the issues presented at such hearings are impervious to collateral attack, and presumptively right."

Then, speaking upon the subject of a correction of a decision of the land department in behalf of a party, the Court says: "He may avoid this decision and charge the legal title derived from the patent which they issue with his equitable right to it on either of two grounds. 1st. That upon the facts found, conceded or established without dispute, at the hearing before the department, its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the patent to him, and to give it to another, (citing authorities,) or, 2nd, that through fraud or gross mistake they fell into a misapprehension of the facts proved before them, which had the like effect (citing authorities). If he would attack the patent on the latter ground, and avoid the department's finding of facts, however, *he must allege and prove not only that there was a mistake in the finding, but the evidence before the department from which the mistake resulted, the particular mistake that was made, the way in which it occurred, and the fraud, if any, which induced it, before any Court can enter upon the consideration of any issue of fact determined by the officers of the department at the hearing.*"

In Marquez vs. Frisbie 101 U. S., at 475, 476, speaking upon this subject, the Court says: "The rule which governs the Courts in the effort to correct any error in such decision has been so repeatedly stated here as to leave no room for doubt or misconstruction. That principle is that 'the decision of the officers of the land department, made within the scope of their authority, on questions of this kind, is, in general, conclusive everywhere, except when considered by way of appeal within that department, and that, as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question. But that in this class of cases, as in all others, there exists in the Courts

of Equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that these officers have, by mistake of the law, given to one man the land which, on the undisputed facts, belonged to another, to give appropriate relief.' (Citing authorities.)

"As we have already said, the argument of counsel is that the bill which was demurred to makes a case of mistake, and of fraud and imposition, within the meaning of these decisions."

"Let us inquire first into the alleged mistake of law by the land department."

"The language of this Court in Moore vs. Robbins, cited above, is that equity will interfere 'when it is *clear* that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another.'"

"This means, and it is a sound principle, that where there is a mixed question of law and of fact, and the Court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive."

The decision in Marquez vs. Frisbie is followed and restated in Vance vs. Burbank, 101 U. S., 514 at 519; United States vs. Atherton, 102 U. S., 372 at 375; Baldwin vs. Stark, 107 U. S., 463 at 465; Maxwell Land Grant Case, 121 U. S., 325 at 380; Bishop of Nesqually vs. Gibbon, 158 U. S., 155 at 166.

In Barden vs. Northern Pacific R. Co., 154 U. S., p. 288, the question was upon the construction of the grant to the Northern Pacific R. Co. relating to mineral lands which, by the terms of the grant, were excepted therefrom. The contention of the railroad company was that unless lands were known to be mineral at the time of the definite location of the road, they were not excepted from the grant.

The Court held that whether the lands were mineral or not mineral was to be determined by the Secretary of the Interior, in this manner determining whether the lands belonged or did not belong to the railroad company under the grant. In deciding this point, the Court, by Justice Field, says (pp. 326 and 327): "*The law places under the supervision of the Interior Department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of public lands of the United States, and the adjustment of private claims to them under the legislation of Congress.* It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can issue the rightful claimant the patent provided by law, specifying that the lands are of the character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands agricultural lands or mineral lands, and so designate them in the patent which it issues. The Act of Congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed, and as the grant excludes mineral lands in the direction for such patent to issue, the land office can examine into the character of the lands and designate it in its conveyance."

"It is the established doctrine, expressed in numerous decisions of this Court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the land department to issue a patent for such land upon ascertainment of certain facts, *that department has jurisdiction to inquire into and determine as to the existence of such facts, and*

in the absence of fraud, imposition or mistake, its determination is conclusive against collateral attack."

Justice Field, in the same connection, referring to the decision of the Court in Smelting Company vs. Kemp, 104 U. S., at pp. 640 and 641, says (pp. 327, 328): "In Smelting Company vs. Kemp, 104 U. S., 636, 640, 641, this Court thus spoke of the land department in the transfer of public lands: 'The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out the land department, as part of the administrative and executive branch of the government has been created to supervise all the various proceedings taken to obtain the title from their commencement to their close. In the course of their duty, the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances by this Court that their judgment as to matters of fact properly determinable by them is conclusive, when brought to notice in a collateral proceeding. *Their judgment in such case is like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction and annulment.*'"

Referring to the decision in Heath vs. Wallace, 138 U. S., 573, 585, Justice Field says (pp. 328 and 329):

"In Heath vs. Wallace, 138 U. S., 573, 585, it was held that 'the question whether or not lands returned as 'subject to periodical overflow' are 'swamp and overflowed lands,' is

a question of fact properly determinable by the land department.' And Mr. Justice Lamar added: 'It is settled by an unbroken line of decisions of this Court in land jurisprudence that the decisions of that department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the Courts of the country.' *If the land department must decide what lands shall not be patented because reserved, sold, granted or otherwise appropriated, or because not free from pre-emption or other claims or rights at the time the line of the road is definitely fixed,* it must also decide whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting lands which were alleged to be mineral, or in refusing to patent them because the evidence was insufficient to show that they contained minerals in such quantities as to justify the issue of the patent. If, as suggested by counsel, when the Secretary of the Interior has under consideration a list of lands to be patented to the Northern Pacific Railroad Company, it is shown that part of said lands contain minerals of gold and silver discovered since the company's location of its road opposite thereto, he would not perform his duty, stated in Knight vs. Land Association, 142 U. S., 161, 178, as the 'supervising agent of the government to do justice to all claims and preserve the rights of the people of the United States,' by certifying the list until corrected in accordance with the discoveries made known to the department. He would not otherwise discharge the trust reposed in him in the administration of the law respecting the public domain."

Again, on page 329, Justice Field quotes from the case of Central Pacific R. R. Co. vs. Valentine, 11th L. D., pp. 238 and 246, this language used by Secretary Noble (see pages 329 and 330): "The very fact, if it be true, that the office of the patent is to define and identify the land granted, and to

evidence the title which vested by the Act, *necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands are subject to the grant and capable of passing thereunder. Now, this jurisdiction is in the land department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company.*"

Justice Field adds, as follows (p. 330): "The fact remains that under the law the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the government to the grantees, reposes in officers of the land department."

In Knight vs. U. S. Land Association, 142 U. S., at p. 181, speaking upon the subject of the jurisdiction of the Secretary of the Interior, Justice Lamar says: "The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. *He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands.*"

In Wisconsin R. R. Co. vs. Price County, 133 U. S., 496, the question in the case was of the necessity of the approval by the Secretary of the Interior of the selection of indemnity lands by the railroad company.

In giving the reasons why such approval is required, Justice Field says (p. 511): "His action in that matter was not ministerial, but judicial. *He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particu-*

lar indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions, he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and if so, what portion had been thus appropriated and what portion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, *but for the protection of the United States against an improper appropriation for their lands.* Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title."

This language is repeated and adopted in the case of United States vs. Missouri, etc., R. R., 141 U. S., at 375 and 376, in deciding that the approval of selections of indemnity lands by the Secretary of the Interior is necessary to give effect to the selections.

In Bockfinger vs. Foster, 190 U. S., 116, after reviewing decisions upon the subject of maintaining suits to establish rights to lands before the title has been conveyed by the United States the Court say: "Both the *Wilcox* and *Schurz Cases* recognize the principle that after the title to public lands has passed from the United States, that is, after the Land Department has performed the last act in the series necessary to pass the title of

the government, the courts will, as between parties asserting conflicting rights in such lands, determine, by appropriate judicial proceedings, which of the parties has the better right. But these cases equally recognize *the principle that the courts will not interfere with the Land Department in its control and disposal of the public lands, under the legislation of Congress, so long as the title in any essential sense remains in the United States.*"

In Cosmos Exploration Co. vs. Gray Eagle Oil Co., 112 Fed., p. 4, decided in the Court of Appeals the right to land was involved which had been selected by the complainant's assignor under the provisions of the Forest Reservation Act of 1897, (30 U. S. Stat., 36,) and on the part of the defendants under the mining laws. The legal title of the land was in the United States, and the claims of the parties in the land department were undecided.

On demurrer to the bill of complaint the Court say (pp. 7, 8):

"The demurrer interposed by defendants, questions the jurisdiction of the Circuit Court. We are of opinion that the Federal Courts are without jurisdiction to entertain a suit to determine the respective rights of the parties to any land to which the title remains in the government of the United States, in regard to which, as shown by the averments of the present bill, a contest between the parties is pending in the land department of the government. In Savage vs. Worsham, (C. C.,) 104 Fed., 18, Judge Ross said: 'It would seem from the bill that the title to the land in question is still in the United States, and that the contest beween complainant and respondent in respect to it is yet pending in the land department. If so, it is clear that the suit cannot be maintained. After the United States has parted with its title and the individual has become vested with it, the equities subject to which he holds

may be enforced, but not before.' Johnson vs. Towsley, 13 Wall., 72, 20 L. Ed., 485; Shepley vs. Cowan, 91 U. S., 330, 23 L. Ed., 424; Marquez vs. Frisbie, 101 U. S., 473, 25 L. Ed., 800.'"

In Savage vs. Worsham, 104 Fed., 18, a bill was filed to determine the right of the complainant to land where the claims of the parties were still pending in the land department. In deciding the case the Court say:

"If the complainant relies upon a mistake of law on the part of the officers of the land department, the bill must contain a clear statement of such mistake, and if fraud is relied upon, the facts constituting the fraud must be set out. It needs no argument to show that the mere use of the words 'fraud' and 'fraudulent' to stigmatize acts which are adverse to complainant's view of his own rights is insufficient."

"It may be added that it would seem from the bill that the title to the land in question is still in the United States, and that the contest between complainant and respondent in respect to it is yet pending in the land department. If so, it is clear that the suit cannot be maintained."

In Michigan Land & Lumber Co. vs. Rust, 168 U. S., 589, the question of the power of the land department over the administration of the Swamp Land Act of 1850 was involved. The opinion of the Court was delivered by Mr. Justice Brewer, and upon the question of the jurisdiction of the land department, the opinion is as follows (pp. 592, 593, 594):

"Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the land department of the government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an Act of Con-

gress will pass the fee. *Strother* vs. *Lucas*, 12 Pet., 410, 454; *Grignon's Lessee* vs. *Astor*, 2 How., 319; *Chouteau* vs. *Eckhart*, 2 How., 344, 372; *Glasgow* vs. *Hortiz*, 1 Black, 595; *Langdeau* vs. *Hanes*, 21 Wall., 521; *Ryan* vs. *Carter*, 93 U. S., 78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title, Rev. Stat., Sec. 2449; *Frasher* vs. *O'Connor*, 115 U. S., 102; but wherever the granting Act specially provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent, *Bagnell* vs. *Broderick*, 13 Pet., 436, 450; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost."

"It is, of course, not pretended that when an equitable title has passed, the land department has power to arbitrarily destroy that equitable title. It has no jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. *Cornelius* vs. *Kessel*, 128 U. S., 456; *Orchard* vs. *Alexander*, 157 U. S., 372, 383; *Parsons* vs. *Venzke*, 164 U. S., 89. In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed. 'A warrant and survey authorize the proprietor of them to demand the legal title, but do not, in themselves, constitute a legal title. Until the consummation of the title by a grant, the person who acquires an equity holds a right subject to examination.' *Miller* vs. *Kerr*, 7 Wheat., 1, 6. After the issue of the patent the matter becomes subject to inquiry only in the Courts and by judicial proceedings. *United States* vs. *Stone*, 2 Wall., 525, 535; *Moore* vs. *Robbins*, 96 U. S., 530; *United States* vs. *Schurz*, 102 U. S., 378, 396; *Bicknell* vs. *Comstock*, 113 U. S., 149, 151; *Iron, Silver Mining Co.* vs. *Campbell*, 135 U. S., 286; *Williams* vs. *United States*,

138 U. S., 514. This jurisdiction of the department has been maintained in cases of pre-emption where the entire purchase money has been paid and a receivers' final certificate issued. *Orchard* vs. *Alexander*, 157 U. S., 372, and cases cited in the opinion; *Parsons* vs. *Venzke*, 164 U. S., 89."

"In *Knight* vs. *United States Land Association*, 142 U. S., 161, is a full discussion by Mr. Justice Lamar of the power of the Secretary of the Interior over proceedings in respect to the disposition of public lands, and on page 178 it is said, as illustrative of the scope of that power: 'For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annullment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney General to take measures to annul.' And, again, on page 181 is this language: 'The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands.' See also *Orchard* vs. *Alexander*, 157 U. S., 372, 381, 382; *Warner Valley Stock Company* vs. *Smith*, 165 U. S., 28, 34."

In Brown vs. Hitchcock, 173 U. S., 473, at 477, after reaffirming the decision in Michigan Land & Lumber Co. vs. Rust, the Court say: "As a general rule no mere matter of administration in the various Executive Departments of the Gov-

ernment can, pending such administration, be taken away from such Departments and carried into the courts; those Departments must be permitted to proceed to the final accomplishment of all matters pending before them, and only after that disposition may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States."

These cases are conclusive upon the point that the findings of the facts which are necessary to be determined in order that the approval of indemnity selections may be made by the Secretary, and also to determine whether the grant is deficient, is a judicial finding which must be made by the Secretary, and that his jurisdiction upon that subject is exclusive.

They are also conclusive that the administration of the Act of July 1, 1898, and the determination of the facts which entitle a party to its benefits are within the like jurisdiction of the Secretary of the Interior. That Act expressly requires the Secretary of the Interior to determine the lands within the Act to be relinquished by the Railway Company.

2nd. The determination of the question whether the grant is deficient, requires the determination of these facts, viz.: *The entire length of the road as it is actually constructed; what are the place limits and what are the indemnity limits; the entire quantity of lands to which the railroad company is entitled under the grant; the entire quantity of lands lost within the primary or place limits prior to July 2, 1864, on the whole line of the road as actually constructed; the entire quantity of lands lost subsequent to July 2, 1864, and prior to the definite location of the route of the road upon the whole line of the road; the entire quantity of lands within the indemnity limits upon the whole length of the road as actually constructed, subject to selection as indemnity lands; and the entire quantity of lands within the second indemnity limits subject to selection within the State of Minnesota.*

3rd. Whether there is a deficiency in the grant must be determined by the length of the road as it was actualy constructed, and not by its length as located by the map of definite location.

Cedar Rapids, etc., R. Co. vs. Herring, 110 U. S., 27 at p. 35.
Scott vs. Kansas Pacific R. Co., 5 L. D., 468 at 472, 473.

4th. The manner in which the place limits of the grant and the indemnity limits of the grant are determined, is specified in Scott vs. Kansas Pacific R. Co., 5 L. D., pp. 468 and 469.

5th. The lands subject to selection within the first indemnity limits are applicable to supply the losses which occured both prior to July 2, 1864 and subsequent to that date, and prior to the location of the definite route of the road throughout the whole line of the road.

6th. State boundaries are not observed in the selection of lands within the first indemnity limits, but the rule is to be observed that the lands selected must be the lands nearest to the lands lost for which the selection is made.

Northern Pacific R. Co., 8 L. D., p. 13.
Northern Pacific R. Co., 17 L. D., p. 404 at p. 406.
Northern Pacific R. Co., 20 L. D., 187 at 189 and 190.
Northern Pacific R. Co. vs. Shepperdson, 24 L. D., 417 and 418.
~~Hagan~~ Hagin vs. Northern Pacific R. Co., 26 L. D., 312 at 317.
Northern Pacific R. Co., 21 L. D., 412 at 423.
Northern Pacific R. Co. vs. Larson, 19 L. D., 233 at 236.
Northern Pacific R. Co. vs. Drew, 23 L. D., 380 at 381.

7th. All the lands in the first indemnity limits are to be exhausted throughout the entire length of the road before any resort can be had to the lands in the second indemnity limits.

8th. If, after the lands in the first indemnity limits are exhausted there remain losses of lands which occurred in Minnesota subsequent to July 2, 1864, and prior to the definite location of the route, resort to selections to supply such losses may be made to the lands in the second indemnity limits in Minnesota.

13th U. S. Stat., p. 367, Sec. 3.
16 U. S. Stat., p. 378.
Northern Pacific R. Co. vs. Halverson, 10 L. D., p. 15 at pp. 16 and 17.
Northern Pacific R. Co. vs. Bass, 13 L. D., 201 a 202.
Northern Pacific R. Co. vs. Larson, 19 L. D., 233 at 236.
Northern Pacific R. Co. vs. Drew, 23 L. D., 380 at 381.
Grunewald vs. Northern Pacific R. Co., 24 L. D., 195 at 199.

9th. *In case there are more lands in the second indemnity limits than are required to supply all losses occurring within the primary or place limits in Minnesota subsequent to July 2, 1864, and prior to the definite location of the road, the grant is not deficient in Minnesota, and selection of the lands in the second indemnity limits must be made under the rule that only those lands shall be selected which are nearest to the lost land for which the selection is made.*

Speaking upon the subject of the selections of indemnity lands the Supreme Court say: "It may be a long time after the line of road is located before it is ascertained how many sections or parts of sections within the primary limits have been lost by sale or pre-emption."

St. Paul, etc., R. Co. vs. Winona & St. Peter R. Co., 112 U. S., p. 720 at 732.

The case of Northern Pacific Railroad Co. vs. Rooney, 30 L. D., p. 403, decided January 10th, 1901, and the decision in relation to the claim of Charles R. Johnson, made by the Secretary of the Interior, May 4th, 1901, 30 L. D., 602, show that the time has not yet passed in which the work of ascertaining how many sections or parts of sections within the primary limits of the Northern Pacific Railroad grant have been lost by sale, or pre-emption, or reservation or other disposition by the government.

The work of determining these facts is still going on.

10th. The Secretary of the Interior, in administering the grant, requires that selections of indemnity lands shall be made under the regulations provided for making selections until a deficiency has been ascertained and established by the Secretary of the Interior, although the quantity of lands may be in fact deficient.

Southern Pacific R. Co. vs. McKinley, 22 L. D., 493.
Southern Pacific R. Co., 18 L. D., pp. 314 and 315.
Northern Pacific R. Co. vs. Davidson, 16 L. D., 457, 458.
Northern Pacific R. Co., 25 L. D., pp. 511, 513 and 514.
Northern Pacific R. Co. vs. Streib, 26 L. D., 589 at 591.
Northern Pacific R. Co. vs. Pettit, 14 L. D., p. 591.
Southern Pacific R. Co. vs. McWharter, 14 L. D., 610.

11th. There has been no determination by the Secretary of the Interior that the grant is deficient.

Rec. pp. 766 at 768, 769.

Hewitt vs. Schultz, 180 U. S., 139 at 157, 158.
Northern Pacific R. R. Co., 25 L. D., 511, 514.
Northern Pacific R. Co. vs. Streib, 26 L. D., 589, 591.
Grunewald vs. Northren Pacific R. R. Co., 24 L. D., 195, 199.

Until there has been *an adjustment of the grant within the place limits,* the extent to which the indemnity lands may be required to supply the deficit can not properly or legally be determined. This is distinctly ruled in Oregon & Cal. R. Co. vs. United States, 189 U. S., 103.

12th. The plaintiffs rely upon the letter of June 7th, 1900, from the Commissioner of the General Land Office to the Secretary of the Interior. (Exhibit 36, p. 435.)

This letter is a report or statement made in pursuance of the circular of November 22, 1887, made by the Secretary of the Interior for the carrying out of the provisions of the Act of Congress of March 3rd, 1887, which directs an adjustment by the Secretary of the Interior of all the railroad land grants, and provides for proceedings for the recovery of lands conveyed in excess of the grants. The circular is found in 6 L. D., p. 276. (The Act of Congress is 24th U. S., p. 556.)

This report is not in any sense an adjustment of the grant in the State of Minnesota. It is only a report of the amount or quantity of lands covered by the grant *in Minnesota,* which report is necessary to be had, with a like report in respect to the lands covered by the grant, in every State into which the grant extends. The Act of Congress under which the circular is issued and this report is made provides for the adjustment of the grant *as an entire grant.*

Atchison, Topeka & Santa Fe R. Co., 21 L. D. 49 at 50.

It can only be known whether there is a deficiency in the grant as a whole, or whether there is a deficiency in any State, *by an adjustment of the entire of the grant.*

The deficiency in the place limits occurring both before and after July 2nd, 1864, down to the time of the definite location of the road, in the State of Minnesota, may be supplied by

the lands within the first indemnity limits along the whole line of the road, and lands cannot be selected in the second indemnity limits until the lands along the entire line of the road within the first indemnity limits have been exhausted.

It follows, therefore, that it cannot be determined that there is any deficiency in the State of Minnesota until the adjustment is made which includes the first indemnity limits of the entire grant.

This letter or report does not purport to be anything else than a statement in reference to the lands in Minnesota, and it is such a report as is necessary to be made use of, *with a statement of like character, of the lands in each of the other States in which the grant extends*, in order to adjust the grant, or to determine whether there is a deficiency in the grant.

The quantity of lands in the second indemnity limits is not stated in this letter or report. It appears by the letter or report that it was not intended to determine the quantity of lands within the second indemnity limits.

As selections of indemnity lands are to be made within those limits, and as the quantity within those limits exceeds the amount which, under the grant, may be selected within them, the selection must be made as in other cases, and be approved by the Secretary of the Interior. In other words, there being more lands in those limits than are required for selection for the losses occurring after July 2, 1864, selections must be made of such lands as may be taken by the company for such losses, and as in other cases the lands selected must be nearest to the lands lost for which selections were made; and every consideration which requires the approval of the Secretary of the Interior in the case of any selections, applies to the selections which shall be made within the second indemnity limits.

13th. St. Paul & Pacific R. Co. vs. Northern Pacific R. Co. 139 U. S., p. 1.

In this case a controversy existed as to the rights of the parties to the suit (the railroad companies) to certain lands within the indemnity limits of the Northern Pacific R. Co. Objection was made that a selection of the lands in dispute had not been made by the Secretary of the Interior. The answer to that objection made by the Court was that it was "sufficient to observe that all the lands within the indemnity limits only made up for a part of the deficiencies; there was, therefore, no occasion for the exercise of the *judgment* of the Secretary in selecting them." (Page 19.)

The statement of the Court of the fact that all the lands within the indemnity limits only made up for a part of the deficiencies was made upon an admission of the parties in that suit. This fact, that it was based upon the admission of the parties in that suit, appears in the decisions of the land department below referred to.

Such admission is not evidence of the fact in any other case.

The decision upon that point has not been recognized except as controlling the controversy in that case.

It has been rejected as authority in respect to the fact of there being a deficiency.

Grunewald vs. Northern Pac. R. Co., 24 L. D., 195 at 198-199.
Southern Pacific R. Co., 18 L. D., 314, 315, 316.
Southern Pacific R. Co. vs. McWharter, 14 L. D., 610 at 612.
Northern Pacific R. Co. vs. Pettit, 14 L. D., 591, 592.
United States vs. Missouri, etc., R. Co., 141 U. S., 358 at 376.
United States vs. Colton Marble & Lime Co., 146 U. S., 615 at 616.

XII.

The attempt to show deficiency in the grant by the testimony of Earl N. Marvin.

1st. The question whether there is such a deficit in the grant that all the lands within the indemnity limits, or what quantity of such lands are required to supply the deficit *can only be determined by an adjustment of the grant by the Secretary of the Interior.* It can not be determined upon evidence taken in this case as is attempted on the part of the complainants.

In Oregon, &c., Railroad Co. vs. United States, 189 U. S., 103, at 115, lands within the indemnity limits of the grant were settled upon by homestead settlers after the location of the definite line of the railroad had been fixed, and before a selection of the lands was made by the railroad company. To defeat the claim of the homestead settlers the railroad company *gave evidence, as is done by the complainants in the present case, to show that all the lands in the indemnity limits were required to supply the deficit in the place limits,* and that for that reason no selection of the lands by the railroad company was necessary. Upon that question the Court say (p. 115): "It is also said that all the lands within the indemnity limits were required to supply the deficit in place limits arising from the disposition prior to definite location by sale or otherwise of lands within the granted limits. But the extent to which lieu lands could be required to supply such deficit in place lands could not be properly or legally determined until there was an adjustment of the grant of lands in respect of place limits. In any event, no such adjustment having taken place prior to the date of the settler's *bona fide* occupancy, his rights, based upon such occupancy, would not be affected by the fact, subsequently appearing, in whatever way, that all the odd numbered sections within the indemnity limits were needed to supply deficiencies in place limits."

2nd. The endeavor to show a deficiency by the testimony of witness Marvin is an attempt to take the administration of the grant out of the hands of the Secretary of the Interior. It is an attempt to determine, independent of the action of the Secretary of the Interior, the vital questions which are necessary to be determined in order for the proper administration of the grant. This action might as well have been taken immediately on the definite location of the route of the road as to undertake to do it now.

It would have been just as competent then, as now, to determine these facts without referring to the actions or determinations of the Secretary of the Interior.

3rd. There is no evidence given in the case of the actual length of the road as constructed; without a determination of which length as (shown above) it cannot be told whether there is or is not a deficiency in the grant.

4th. The testimony of Marvin is confined to showing these points, viz.: The quantity of land *in Minnesota* in the odd numbered sections within the place limits, and the quantity of those lands which had been disposed of at the date of the definite location of the road. (R. pp. 133, 136, 137, 138, 144.)

The total area of lands in Minnesota in the first indemnity limits. (R. pp. 133, 134, 137.)

The total area of the lands in the first indemnity limits in Minnesota disposed of at the date of the definite location of the road. (R. pp. 134, 137, 144, 145.

The total area in the place limits in Minnesota disposed of subsequent to July 2, 1864, and prior to the definite location of the road. (R. pp. 137, 138.)

The quantity of lands in the first indemnity limits in Minnesota disposed of prior to July 2nd, 1864. (R. pp. 166, 167.)

The quantity of lands in first indemnity limits in Minnesota disposed of between July 2nd, 1864, and the date of definite location. (R. pp. 167, 168.)

He made no examination in respect to the lands or quantity of them subject to selection within the second indemnity limits. (R. p. 157.)

5th. These findings or determinations of the witness, if they are competent evidence at all, do not tend to show that there is any deficiency in the grant.

They all relate exclusively to the lands in the primary place limits, or the first indemnity limits *within the State of Minnesota.*

They do not tend to show that all the losses within the place limits in the State of Minnesota could not be supplied from the lands subject to selection within the first indemnity limits of the grant along the whole line of the road.

They do not show anything relative to the quantity of lands within the second indemnity limits.

6th. The testimony of Mr. Marvin is incompetent.

There is nothing to show that the maps and plats in the government office, to which he refers, correctly show the losses in the primary limits, or correctly show the lands subject to selection within the first indemnity limits.

There is nothing to show that the boundaries defining the primary limits of the grant, or the boundaries of the first indemnity limits of the grant, have been determined by the Secretary of the Interior, or that they are, as determined by him, shown upon those maps or plats.

If these maps and plats would correctly show those facts, then proof should be made by certified or sworn copies of the maps and plats.

The testimony of Mr. Marvin is not a statement of what the maps and plats are, or of what they show, in fact, but his testimony is a statement of *his conclusions drawn by him* from an examination of the maps and plats in connection with maps and plats found and used in the office of the Northern Pacific Railroad Company.

See R. pp. 137, 138, 139, 140, 141, 154, 155.

7th. There is no statement in the bill of complaint that *there is a deficiency in the second indemnity limits*, or that there are not more lands subject to selection in those limits than were lost to the grant in Minnesota subsequent to July 2, 1864.

No such claim is made in the case either upon the pleadings or the evidence.

8th. It was not possible nor competent for the witness Marvin to show a deficiency in the grant by any computation to be made by himself.

There must be an adjustment of the grant by the land department, basing the adjustment upon the records as a finality, before it would be competent for him to testify from what the record showed.

Section 3 of the grant provides that: "If said route (of the Northern Pacific Railroad) shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this Act."

The witness could not investigate nor determine that question. He did not pretend to do so. He could not speak from the records upon the subject until the final determination had

been made by the land department, and no such determination had been made. The witness speaks only from the records as he found them (R. pp. 133, 134,) and the records had not been made upon that subject.

XIV.

The complainant's contention that under the resolution of May 31st, 1870, (16 U. S. Stat., 378, 379,) the Northern Pacific Railroad Company was entitled to select lands in the second indemnity limits, to the extent of and in lieu of lands in the first indemnity limits, which had been disposed of by the government after July 2nd, 1864, and prior to the definite location of the line of the road.

The point does not seem to be material in the determination of this case, but it is submitted that the contention of the complainant cannot be sustained.

The provisions of the resolution are to be construed in connection with the Act of July 2nd, 1864, making the grant to the company.

By section 3 of that Act (13 U. S. Stat., p. 367,) it was provided: "That there be and hereby is granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten

alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, *any of said sections, or parts of sections,* shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

The Act contemplated that there would have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, a portion of the odd numbered sections within the primary limits of the grant, at the time when the line of the road should be definitely fixed—and because of that fact the provision was made that lands might be selected within the additional limits of ten miles to supply or make up for the land which had been so granted, or otherwise disposed of by the government, it was to make up for the loss to the railroad company of the "granted lands" within the place limits.

At the date of the adoption of the resolution of May 31st, 1870, the railroad company had not definitely fixed the line of its road although nearly six years had passed since the date of the grant.

It was contemplated that during that time sections, or parts of sections, had been granted, sold,reserved, occupied by home-

stead settlers or pre-empted, or otherwise disposed of, some portions of the lands which would be located within the limits of the granted lands as those limits would be determined by the definite location of the road, when that location should be made.

To provide for such change having occurred in the *granted lands, the resolution was adopted.*

The resolution provides: "That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bond to aid in the construction and equipment of its road. * * * And also to locate and construct, under the provisions and with the privileges, grants and duties provided for in the Act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound: and in the event of there not being , in any State or territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of 1864, *to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the Act of July two, eighteen hundred and sixty-four.*"

The resolution first confirms to the railroad company *the same privilege and grant* which had been granted to it by the Act of July 2nd, 1864, that is, it re-affirmed the same grant of lands within the same primary limits, with the same privilege of selection of lands within the additional indemnity limits, to supply the place of lands which had been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of within the granted limits, and it provides that if there should not be *the quantity of lands granted* within the limits granted by its charter, then, for the amount of lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the Act of July 2nd, 1864, lands may be selected within additional limits of ten miles. That is to say, the original indemnity limits have been extended ten miles to make up for the granted lands which have been disposed of or taken out of the grant subsequent to July 2nd, 1864.

The resolution of May 31st, 1870, is intended simply as an extension to the width of ten additional miles *of the limits within which selections might be made*, but limiting the right of selection within those additional limits to the making up of the quantity of lands which should be disposed of within the primary limits by the government subsequent to the date of the grant, July 2, 1864, and prior to the fixing of the definite line of the road.

That is the construction which was given to the resolution of May 31, 1870, by Secretary Vilas and by Attorney General Garland, in 1888 and 1889. (8th L. D. pp. 13 and 14.)

An examination of the decisions of the land department fails to disclose that any other construction of this resolution has at any time been claimed on the part of the Northern Pacific Railroad Company before the land department. It is submitted that the language of the resolution is to be un-

derstood in this sense,—that, in the event of there not being at the time of the final location of the line of the road, the amount of lands per mile granted by Congress to said company, within the limits of the granted lands prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or territory within ten miles on each side of said road beyond the limits allowed for selections prescribed in said charter, as will make up such deficiency.

It is the deficiency in the granted lands alone which is to be made up. It is not a deficiency either in whole or in part, of the lands in the indemnity limits which is authorized to be supplied by the resolution. The Supreme Court and the land department have defined the lands granted within the primary limits "granted lands," and the lands which the railroad company is authorized to select to make up the deficiency in the granted lands are designated as "indemnity lands," and it is the deficiency in the granted lands within the granting limits which the resolution refers to and which is to be supplied, and not any deficiency in the indemnity lands.

Southern Pac. R. Co. vs. Bell, 183 U. S., 675.
Barney vs. Winona, &c., R. Co., 117 U. S., p. 228 at 232.
Wisconsin R. Co. vs. Price Co., 133 U. S., 496 at 513-514.
Northern Pac. R. Co. vs. Miller, 7 L. D., 100 at 120, 121.
Grunewald vs. Northern Pac. R. Co., 24 L. D., 195 at 199.

XV.

The lands described in Exhibit A of the bill of complaint, which are within the second indemnity limits.

Considering these lands separately, the evidence fails to show any title in the complainants to them.

1st. No title can be acquired by the railroad company to lands within the second indemnity limits until it is shown that the lands in the first indemnity limits throughout the entire length of the road subject to selection have been exhausted.

While the company is permitted to file selections of lands in the second indemnity limits, no action can be taken upon such selections and no title passes to them until it is shown that the lands in the first indemnity limits are exhausted.

Northern Pacific R. Co. vs. Halvorson, 10 L. D., 15 at pp. 16 and 17.
Northern Pacific R. Co. vs. Bass, 19 L. D., 201 at 202.
Northern Pacific R. Co. vs. Larson, 19 L. D., 233 at 236.
Northern Pacific R. Co. vs. Drew, 23 L. D., 380 at 381.
Grunewald vs. Northern Pac. R. Co., 24 L. D., 195 at 199.

2nd. For supplying losses within the primary limits of any State, all lands subject to selection within the first indemnity limits in that State are to be exhausted, and then selections are to be made from the lands within the first indemnity limits of the other States, in making the selections the rule being observed of taking the lands which are subject to selection nearest to the lost lands.

In this manner the entire of the lands subject to selection within the first indemnity limits along the entire route of the road are to be exhausted before any title can be acquired to any lands in the second indemnity limits upon any part of the route.

When in this manner the entire of the lands within the first indemnity limits upon the whole line of the road shall have

been exhausted, and there shall appear to be a deficiency in the State of Minnesota, to the extent that such deficiency may exist of lands lost subsequent to July 2nd, 1864, and prior to the definite location of the road, resort may be had to selections within the second indemnity limits of that State. See following cases before cited.

Northern Pacific R. Co., 8 L. D., p. 13.
Northern Pacific R. Co., 17 L. D., 404 at 406.
Northern Pacific R. Co., 20 L. D., 187 at 189, 190.
Northern Pacific R. Co. vs. Shepherdson, 24 L. D., 417, 418.
Hagen vs. Northern Pacific R. Co., 26 L. D., 312, 316, 317.
Northern Pacific R. Co., 21 L. D., 412 at 422, 423.

3rd. The fact that the entire of the lands subject to selection within the first indemnity limits have been exhausted, like the determination whether there is a deficiency in the grant, is to be determined by the Secretary of the Interior.

This has not been determined by him.

It has not been determined by any evidence in the case; the evidence of Mr. Marvin does not go to that question at all. Nor does the letter of June 7, 1900, of the Commissioner of the Land Office.

It follows that no title has been acquired to those lands.

4th. The selection of these lands situated in the second indemnity limits can be made only to supply losses in the primary limits occurring subsequent to July 2nd, 1864.

16 U. S. Stat., 378, 379.

5th. *There is no evidence in the case that these selections are of lands which were subject to selections situated nearest to the lands lost for which the selections were made.*

It is not averred in the bill of complaint that they are such lands.

For this reason also the selections are without force.

XVI.

The lands in controversy which were selected in the second indemnity limits based upon lands lost in the place limits which were withdrawn for the benefit of the Lake Superior & Mississippi Railroad, under the grant for that road of May 5th, 1864.

13 U. S. Stat., p. 64.

On May 26th, 1864, a map of the general or probable route of the Lake Superior & Mississippi Railroad having been filed in the office of the Commissioner of the General Land Office, an order of the Secretary of the Interior was made withdrawing the lands for the width of about twenty miles along said route, for the benefit of said grant.

On December 25th, 1866, the route of the road was definitely located. After this definite location, viz.: On November 2nd, 1866, the Secretary of the Interior continued the withdrawal of May 26th, 1864, in so far as the lands embraced within the withdrawal fell within the place limits, or within the indemnity limits, fixed by the location of the route. The withdrawal thus made was never revoked.

Exhibit 70, R. p. 573.
Exhibit 71, R. p. 575.
Exhibit 76, R. p. 599.
Exhibit 77, R. p. 600.
Northern Pacific R. R. Co. vs. Rooney, 30 L. D., 403.

It thus appears that both at the date of the grant to the Northern Pacific Railroad viz.: July 2nd, 1864, and at the date of the definite location of the route of the road, July 6, 1882, the withdrawal was in force, and the lands embraced within the withdrawal were excepted from the grant to the Northern Pacific Railroad Company, and being thus excepted from the grant do not constitute a basis for selection of lands within the second indemnity limits.

This has been held repeatedly by the Secretary of the Interior.

Northern Pacific R. R. Co. vs. Rooney, 30 L. D., 403.
Northern Pacific R. R. Co. vs. Rooney, 29 L. D., 242.
Johnson vs. Northern Pacific Ry. Co., 30 L. D., 602.

The point is that the withdrawal of the lands made in favor of the Lake Superior & Mississippi Railroad under the earlier grant of May 5th, 1864, prior to the time of the grant to the Northern Pacific Railroad Company, and prior to the definite location of its route, excepted the lands within the withdrawal from the grant to the latter company. That such is the effect of the withdrawal is decided by the Supreme Court.

Northern Pacific R. R. Co. vs. Musser-Sauntry Co., 168 U. S., 604.
Wisconsin Cent. R. R. Co. vs. Forsythe, 159 U. S., 46.
Spencer vs. McDougal, 159 U. S., 62.
Wolcott vs. Des Moines Co., 5 Wall., 681, 688.
Wolsey vs. Chapman, 101 U. S., 755 at 768 to 770.
Hamblin vs. Western Land Co., 147 U. S., 531 at 536.
St. Paul & Pacific Railroad vs. Northern Pacific R. R., 139 U. S., 1 at 17, 18.
Kansas Pacific R. R. Co. vs. Dunmeyer, 113 U. S., 629 at 640, 641.
Bardon vs. Northern Pacific R. R. Co., 145 U. S., 535 at 545.

United States vs. Missouri, &c., R. R. Co., 141 U. S., 358 at 369.
Northern Pacific R. R. Co. vs. Miller, 7 L. D., 100 at 112.

In Northern Pacific Railroad Co. vs. Musser-Sauntry Co., 168 U. S., 604, there were these facts: June 3rd, 1856, a grant was made to Wisconsin, to aid in the construction of a railroad, granting six sections in width on each side of the line of the road, and fifteen miles indemnity limits. The line of the road was definitely fixed September 20th, 1858. On May 5th, 1864, Congress enlarged the grant to ten sections in width on each side of the line of the road and to twenty miles indemnity limits. The Chicago, &c., Railroad Company became the beneficiary of the grant. The lands in question in the case were within the indemnity limits of that grant being more than fifteen miles and less than twenty miles from the line of the road. In March, 1866, the lands were withdrawn from sale by the Secretary of the Interior for the benefit of that grant, which withdrawal remained until 1889. In 1883 the Chicago, &c., Railroad Company selected the lands for lands lost in place. On July 30th, 1870, the Northern Pacific Railroad Company filed a map of general route of its road, and on August 13th, 1870, a withdrawal of the lands within twenty miles of its route was ordered to be made of its grant. On July 6th, 1882, the Northern Pacific Railroad Company definitely fixed the line of its road opposite these lands. These lands are within the limits of the withdrawal made in favor of the Northern Pacific Railroad Company, and, also, within the place limits of the grant to that company, as those limits were fixed according to the map of definite location.

The Northern Pacific Railroad Company filed its bill to quiet title.

It will be seen that these lands were within the indemnity limits of the Chicago, &c., Railroad Company's grant and were within the withdrawal made in favor of that grant, which withdrawal was made in March, 1866 after the grant to the Northern Pacific Railroad Company of July 2nd, 1864, but before the line of definite location of said company's road was fixed.

The distinct question in the case was whether a withdrawal from sale of lands in the indemnity limits of the Chicago, &c., Railroad grant excepted the lands from the grant to the Northern Pacific Railroad Company, which fell within the place limits of its grant.

The Court held that the grant to the Northern Pacific Railroad Company was only of lands to which the United States had "full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, *at the time the line of said road is definitely fixed;*" that the land having been withdrawn under the grant of May 5, 1864, at the time the line of the Northern Pacific road was definitely located, it was excepted from its grant as land which had been reserved within the terms of the grant to the Northern Pacific Railroad Company.

Mr. Justice Brewer, delivering the opinion of the Court, says (p. 607):

"But a single question is presented in this case, and that is whether the withdrawal from sale by the land department, in March, 1866, of lands within the indemnity limits of the grant of 1856 and 1864 exempted such lands from the operation of the grant to the plaintiff. It will be perceived that the grant in aid of the defendant railway company was prior in date to that to the plaintiff and that before the time of the filing of plaintiff's maps of general route and definite location the lands were withdrawn for the benefit of the defendant. The grant to the plaintiff was only of lands to which the United States had 'full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed.'"

"The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid, and operated to withdraw the odd numbered sections within its limits from disposal by the land officers of the government under the general land laws. The act of the Secretary was in effect a reservation."

In Wisconsin Central Railroad Company vs. Forsythe, 159 U. S., 46, there were these facts:

June 3rd, 1856, a grant was made to Wisconsin, to aid in the construction of a specified line of railroad. June 12th, 1866, the land department made a withdrawal of lands to satisfy the grant, October 8th, 1856, Wisconsin accepted the grant, and on October 11th, 1856, conferred the grant upon the railroad company.

Nothing was done for the construction of the road until after the passage of a further Act of Congress of May 5th, 1864, by which there was granted to Wisconsin, to aid in the construction of a designated line of railroad, every alternate section of public lands designated by odd numbers, for ten sections in width on each side of said road, and providing that in case "it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of, any sections, or parts thereof, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, then it shall be lawful for any agent or agents to be appointed by the Governor of said State, to select, subject to the approval of the Secretary of the Interior, from the public lands of the United States nearest to the tier of sections above specified, as much land in alternate sections, or parts of sections, as shall be equal to such land as the United States have sold or otherwise appropriated, or to which the right of homestead or pre-emption has attached, as aforesaid."

The benefit of this land grant of 1864 passed to the plaintiff which claimed the land in dispute.

The land department rejected the claim on the ground that the land having been withdrawn for the benefit of the grant of 1856, it was excepted from the grant of 1864.

Mr. Justice Brewer, delivering the opinion of the Court, upon this point says (pp. 54, 55):

"The title of the plaintiff, as we have seen, can only be defeated by reason of the land not being within the scope of the grant made by the third section of the Act of 1864, and it is only excluded therefrom by the grant of 1856, and the reservation made in pursuance thereof. The reliance of defendants is on the long established rule, often affirmed by this Court and recognized in section six of the Act of 1864, to the effect that a grant by Congress does not operate upon lands theretofore reserved for any purpose whatsoever. There can be no doubt as to this rule, or as to the fact that lands withdrawn from sale by the land department are considered as reserved within its terms."

But the Court further held that it was the intention of the Act of Congress of 1864 to aid in the construction of the same line of railroad to aid which the grant of June 3rd, 1856, was made, and not a different line of road, and that being the case as the title to the land which was withdrawn under the grant of 1856 *was still in the United States*, it was within the power of Congress to include them in the second grant to aid in the same public improvement, and that it was the intent of the Act of 1864 so to convey them.

The opinion says (p. 55) as follows: "The alternate sections within the six and fifteen-mile limits of the Bayfield road were not granted by the Act of 1856. They were simply withdrawn from pre-emption and sale by the action of the land department in order that the beneficiary of the grant might, in case the full amount of lands granted was not found within the place limits, select therefrom enough to supply the deficiency. We do not mean that they were not reserved lands; on the contrary, as stated above, they were. Such is the uniform ruling of this Court in interpreting like action on the part of the land departmnet. Nevertheless, not being granted

lands, they were still within the disposing power of Congress. There would be no question of the title of one to whom Congress had in terms granted them. 'Until selection was made the title remained in the government, subject to its disposal at its pleasure.'"

In Spencer vs. McDougal, 159 U. S., 62, the same question arose as to lands within the same grants, relating to lands in the place limits. The point was made that the withdrawal was of too much land, to-wit, all the lands in the district. The Court refers to the case of Wolcott vs. Des Moines Co., 5 Wall., 681, where the withdrawal was of lands the whole length of Des Moines River. It was a disputed question whether the grant terminated at the mouth of the Raccoon Fork, or extended the whole length of the river. After the withdrawal, in the subsequent litigation it was decided by the Supreme Court that the grant terminated at the mouth of the Raccoon River. The Court say (p. 65):

"But in the case cited it was held that the withdrawal by the land department of lands above the mouth of the Raccoon River was valid, and that a subsequent railroad grant, with the ordinary reservation clause in it, did not operate upon the lands so withdrawn. If a withdrawal of land beyond the terminus of a grant can be sustained, as it was in that case, equally so should be one made in anticipation of the locations of two lines of road, which locations were as yet undetermined, and might be such as to bring almost any portion of the lands withdrawn within the indemnity limits of the grant."

These decisions are direct to the point that under the grant to the Northern Pacific Railroad only such lands are granted by the Act as "the United States have full title, not reserved, sold, granted or otherwise appropriated, and are free from pre-emption or other claims or rights at the time the line of said road is definitely fixed," and that lands which are withdrawn from sale by the land department prior to the time

when the line of the road is definitely fixed are excepted from the grant.

These cases further hold that title to the lands so withdrawn remains in the United States, and that the United States may grant or convey those lands, passing the title to them to any other company at any time prior to the time when the line of the Northern Pacific Railroad Company shall be definitely fixed.

In United States vs. Missouri, &c., R. Co., 141 U. S., 358 at 369 the construction of an Act of 1850 granting lands but reserving from the grant all lands reserved by an Act approved March 2, 1827, was involved. Speaking upon this subject, referring to subsequent railroad grants, the Court says (page 369): *"The policy indicated in this reservation was pursued in all subsequent Acts granting lands to aid in the construction of railroads;* the only difference between the reservation clause and the Act of 1850, and those inserted in subsequent Acts, being that the former was special in its application to a particular previous grant, *while each one of the latter class was general in its application to prior grants of every kind.* The manifest object of the general proviso was to exclude from the particular grant all lands previously reserved to the United States for any specific object whatever, and thereby enabling the government to accomplish those objects without confusion or conflict in the administration of the public domain, and thus keep faith with those who or for whose benefit prior grants were made."

In Northern Pacific R. Co. vs. Miller, 7 L. D., 100 at 112, Secretary Vilas, while holding that the withdrawal of lands beyond the place limits in the case of the Northern Pacific Railroad grant was contrary to the terms of the grant, stated upon the subject of the power of the withdrawals, as follows (p. 112): "The extent to which the Supreme Court has gone in its decisions, and the extent which the reason of the thing

supports, appears to be that the president may, in execution or furtherance of a public purpose committed, generally or specially, by Congress to the executive to effectuate, when in his judgment such action is desirable to the accomplishment of that purpose and will not infringe any limiting provision of statute governing the particular case, withdraw or withhold by his order any portion of the public domain from the operation of the general laws for its disposition and devote it to such public use subject to review by Congress; and also that *in such a case*, the order of the department or land office will be conclusively presumed to have been directed by him, without proof of the fact and probably irrespective of it."

The case of the United States vs. Oregon & California Railroad Company, 176 U. S., 28, cited by complainants' brief (p. 56), is in accord with the above cases, and does not sustain the position for which it is cited.

Whether lands withdrawn from sale or pre-emption for the benefit of a railroad grant when based upon a mere location of general route operates to exempt the lands withdrawn from the operation of a subsequent congressional grant *depends upon the terms of the subsequent grant.*

If the subsequent grant is in terms like the grant to the Northern Pacific Railroad Company, *the withdrawal does exempt them*, because such grant, by its terms, does not include lands withdrawn or reserved.

If the subsequent grant is in terms like the grant to the Oregon & California Railroad Company involved in said case in 176 U. S., 28, *the withdrawal does not exempt such lands*, because the terms of the grant include and grant lands which have been withdrawn or reserved, *the title to which is in the United States at the date of the subsequent grant.*

In the case of the United States vs. Oregon & California Railroad Company, 176 U. S., 28, the facts are as follows:

After the grant to the Northern Pacific Railroad Company of July 2nd, 1864, viz.: on July 25th, 1866, Congress made a grant to aid in the construction of a railroad from Portland to the Central Pacific Railroad in California. The grant was conferred on the Oregon, &c., Railroad Co., which company, on the 29th of October, 1869, filed its map of definite location of its route opposite to the land in suit, and in February, 1870, the lands in dispute were withdrawn by order of the Secretary of the Interior under said grant of 1866.

On March 6th, 1865, President Perham, of the Northern Pacific Railroad Company, sent a communication, and map, to the Secretary of the Interior, asking that the lands be withdrawn in accordance with map for the benefit of the Northern Pacific Railroad Company. The Secretary declined to make the withdrawal. August 4th, 1870, the Northern Pacific Railroad Company filed two maps of the *general* route of its road, which were accepted, and withdrawals of the lands were made by the Secretary in accord with said maps, August 13th, 1870, and October 27th, 1870, which embraced the lands in controversy.

There never was any definite location of the Northern Pacific Railroad line opposite to the lands.

The question presented in the case was this:

The grant to the Northern Pacific Railroad Company made July 2nd, 1864, being a grant of only the lands to which the United States "have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed," and no definite line of the road having been fixed, did the grant made for the Oregon, &c., Railroad Company, on July 26th, 1866, (said company having fixed the definite line

of its road on October 29th, 1869,) convey to that company the lands in dispute?

The Court held that the lands did pass to the Oregon, &c., Railroad Company by that subsequent grant.

The decision was upon the ground that the grant to the Northern Pacific Railroad Company entitled it to *only such lands as the United States had title to, and which were not reserved, sold, granted, or otherwise appropriated, and are free from pre-emption, or other claims or rights, at the time the line of said road should be definitely fixed;* that at any time before the line of such road should be definitely fixed the United States had authority to grant to other companies any of the land to which the United States retained the title; that at the time of the grant of July 26h, 1866 for the Oregon, &c., Railroad Company, there had been no reservation of the land in the Perham map of the general route of the Northern Pacific Railroad filed March 6th, 1865; but that even if there had been such a withdrawal, the title to the land withdrawn was in the United States, and it could grant the lands, because the Northern Pacific Railroad Company had not filed its line of definite location, and was entitled to only such lands as the United States had title to, not reserved or withdrawn at the date when the definite location of the road should be made; and that the grant to the Oregon, &c., Railroad Company conveyed such lands.

The granting clause of the Act of July 25th, 1866, grants "every alternate section of public land, not mineral designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side of said railroad line.)"

It will be observed that the granting clause of this Act differs from the granting clause of the Act of July 2nd, 1864, to the Northern Pacific Railroad Company.

This Act of July 25th, 1866, grants *every alternate section of public land, not mineral,* while the grant to the Northern

Pacific Railroad Company grants only public lands, not mineral, to which the United States has full title not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, *at the time the line of said road is definitely fixed.*

The Court held that the terms of the Act of 1866, conveyed lands to which the United States had title, even though they were withdrawn or reserved.

The suit was brought by the United States under the claim that the lands had been forfeited by the Northern Pacific Railroad Company, and that they had not been granted to the Oregon, &c., Railroad Company.

The Court decided that, as the Northern Pacific Railroad Company had not filed any definite location of its road prior to the Act forfeiting its rights, it never had title to the land, and that the Act of 1866 granted the land to the Oregon, &c., Railroad Company.

So far as the lands within the withdrawal in question, made May 26th 1864, under the Act of May 5th, 1864, in favor of the Lake Superior & Mississippi Railroad fell within the primary place limits of the Northern Pacific Railroad Company, that railroad company would be entitled to make indemnity selections therefor as for the lands lost in place, *but its selections must be confined to the first indemnity limits of its grant.*

Selections can not be made from the second indemnity limits to supply such losses from the lands which are reserved prior to July 2nd, 1864, and are not lands lost subsequent to July 2nd, 1864, and prior to the definite location of the Northern Pacific Railroad.

An examination of the selection of the lands in Exhibit A of the bill of complaint, and of the basis assigned for such selection, shows that many of those lands are in the second indemnity limits of the Northern Pacific Railroad, and that the basis assigned for these selections are lands which are within said withdrawal of May 26th, 1864. Such selections, therefore, are without any basis to support them, and the Secretary of the Interior is without authority to approve them, since selections within the second indemnity limits can be made only to supply lands lost within the primary limits by their having been reserved or disposed of by the government *after* July 2nd, 1864, and before the definite location of the route of the road.

BENTON HANCHETT,
Of Counsel for Defendants Waldo A. Avery and others.

H. H. HOYT,
Solicitor for Defendants Waldo A. Avery and others.